IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-880

LOCAL UNION NO. 373, *et al.*,
Petitioners,

vs.

PHILIP MUNDY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Petitioners, International Association of Bridge, Structural and Ornamental Ironworkers, Local Unions Nos. 11, 45, 373, 480 and 483, AFL-CIO, respectfully pray that a Writ of Certiorari issue to review a judgment entered by the Superior Court of New Jersey, Appellate Division, in five consolidated cases. A Petition for Certification to review the judgment was denied by the New Jersey Supreme Court on September 5, 1978.

Opinions Below

Petitioners were defendants in five separate state court proceedings involving the identical issues. These cases are as follows: *George Connell, et al.* v. *Local 483,* et al. (Docket No. C-4434-74) and *Jack Hespelt, et al.* v. *Local 483,* et al. (Docket No. C-2157-75); *Philip Mundy, et al.* v. *Local Union No. 373,* et al. (Docket No. C-2156-75); *Alfonso A. Esposito, et al.* v. *Local Union No. 11* (Docket No. C-2155-75); *Walter J. Serafin, et al.* v. *Local Union No. 480* (Docket No. C-3254-75); and *Walter Handley, et al.* v. *Local Union No. 45, et al.* and *Local Union No. 45, et al.* (Docket No. C-1555-76). These cases were consolidated for appeal purposes by the New Jersey Superior Court, Appellate Division.

There were no reported opinions rendered in the consolidated matters. An oral opinion in the *Connell-Hespelt* case was delivered by Hon. Bertram Polow, J.S.C. (App. 1a); an oral opinion in the *Mundy* case was delivered by Hon. David D. Furman, J.S.C. (App. 32a); a letter opinion in the *Esposito* case was rendered by Hon. Arthur C. Dwyer, J.S.C. (App. 45a); an oral opinion in the *Serafin* case was delivered by Hon. Harold A. Ackerman, J.S.C. (App. 80a); and a letter opinion in the *Handley* case was rendered by Hon. Frederick C. Kentz, Jr., J.S.C. (App. 129a). These decisions were substantially affirmed by the Superior Court of New Jersey, Appellate Division, in an unreported per curiam decision (App. 150a). The New Jersey Supreme Court rendered no opinion in denying the Petition for Certification (App. 158a).

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division, was made and entered on July 3, 1978 (App. 150a). A Petition for Certification to review this judgment was denied by the New Jersey Supreme Court on September 5, 1978 (App. 158a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

Questions Presented

Respondents, members of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO (hereinafter referred to as the "International") brought suit seeking an order compelling Petitioners to accept their transfer into local union membership. Pursuant to a directive from the New Jersey Supreme Court rendered in *Moore, et al.* v. *Local 483, et al.,* 66 N. J. 527 (1975), Petitioners were obligated to state the specific reasons for any transfer rejection. Petitioners had rejected the transfer applications on the grounds that acceptance of Respondents into membership would cause a further imbalance in the minority makeup of the Locals and would, therefore, jeopardize Petitioners' compliance with ongoing Title VII orders and decrees entered in the United States District Court of New Jersey. (*U.S.A.* v. *Plumbers Local 24, et al.,* U.S.D.C. N.J. No. 444-71). Petitioners contended that a Consent Decree entered in the Title VII action imposed upon them a goal of achieving a 20% minority membership, which would be frustrated by the acceptance of substantial numbers of additional non-minority members.

The trial courts in spite of the evidence introduced regarding the particular nature of Petitioners' federal civil

rights commitments, concluded that the Title VII reason constituted an "arbitrary" exercise of Petitioners' discretionary power to accept or reject transfers. In making these rulings, each of the trial courts accepted to some extent Petitioners' explanations of their Title VII commitments under the ongoing Consent Decree but characterized Petitioners' rejection of Respondents' transfer requests as a form of impermissible "reverse discrimination". The Appellate Division affirmed these rulings. The questions presented, therefore, are:

1. Whether the interpretation given by the New Jersey State Courts to the Consent Decree of the United States District Court for the District of New Jersey effectively prevents Petitioners from fulfilling certain affirmative action obligations which formed the basis for the Consent Decree.

2. Whether the rejection of white transfer applicants based upon ongoing Title VII affirmative action commitments constitutes impermissible reverse discrimination.

3. Whether the decisions of the New Jersey State Courts constitute an impermissible collateral attack upon a judgment of a United States District Court and are, thus, violative of the principles of comity.

Federal Statute Involved

The within matter involves the effect to be given to a judgment entered by a United States District Court for the District of New Jersey in the matter entitled *U.S.A. v. Plumbers Local 24 (Ironworkers Cluster)*, Civil No. 441-71, which action was instituted pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq.

Statement of the Case*

Petitioners' justification for denying the transfer applications was based upon their understanding of affirmative action obligations imposed pursuant to a Title VII Consent Decree. A typical letter of rejection stated in part:

> The Executive Board of Local 480 has also been advised by counsel that an acceptance of your transfer at this time would cause a further imbalance in the minority makeup of this Local and would, therefore, adversely affect the continuing Title VII orders and decrees entered in the United States District Court of Northern New Jersey in a case (U.S.A. v. Plumbers Local 24, et al, U.S.D.C.N.J. No. 444-71) involving, among others, all five Locals of the District Council of Ironworkers of Northern New Jersey. Such orders and decrees imposed upon all five ironworker locals an obligation to exercise good faith efforts to achieve during the period 1972-1977 a makeup of 20% of minority journeymen and apprentice members. Counsel has, therefore, advised the Executive Board that the acceptance of white transfers at this time would place Local 480 in jeopardy of violating its commitments and obligation to the Government.

The central issue before the state courts involved, therefore, a determination as to the exact nature of Petitioners' commitments under the federal decree. A substantial federal question was, thus, immediately presented; Petitioners

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* Since the identical issue was presented in each of the within cases, involving essentially the same proofs, references to the trial record herein will relate for the sake of brevity and clarity only to the *Serafin* case.

claiming a right to reject transfers pursuant to the provisions of a judgment entered in a United States District Court.

Accordingly, virtually all the proofs introduced at trial dealt with an interpretation of the Consent Decree in relation to applicants' transfer rights. Relevant pleadings in the federal proceedings were introduced into evidence, as well as testimony from the attorneys who actually negotiated and drafted the language of the Decree, i.e., Nathan Duff and Robert Kennedy on behalf of the locals, and Thomas Hunt on behalf of the United States Department of Justice. Their uncontradicted testimony substantiated the correctness of Petitioners' understanding of their affirmative action obligations under the Decree. Despite such uncontroverted proofs, however, the Appellate Division, in affirming the courts below, elected to "disagree" (App. 157a), with the locals' interpretation of their Title VII commitments. It thus becomes incumbent to briefly discuss herein the general background and nature of the Title VII reason for rejection.

A. The Consent Decree

The Title VII Consent Decree was entered by Hon. Leonard J. Garth, U.S.D.J., on July 28, 1972. The Title VII action had been instituted by the Department of Justice in order to eradicate and correct a racial imbalance which existed in the membership of the respective Locals. The Locals had virtually no minority members at the inception of its Decree. The negotiated Decree imposed certain affirmative action obligations upon the locals, the most important requiring the indenturing of 375 minorities over a five year period* (App. 138a).

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* The term of the Decree has subsequently been extended for an indefinite period by Consent Order due to the fact that the depressed state of the construction industry in Northern New Jersey had made on-the-job training of minority applicants impossible.

Hunt testified that the 375 minority goal was predicated upon the then existing white membership of the locals remaining relatively stable. Such a number would result in the achievement of a minority membership percentage of approximately 20% to 25% at the end of the Decree (App. 139a). Hunt indicated that the achievement of a minimum minority goal of 20% was important to the Justice Department for the following reasons:

> 1. It would approximate what the minority makeup would have been absent racial discrimination;
>
> 2. It would be a large enough percentage so that the minorities would have a sufficient power base to successfully protect their rights; and
>
> 3. It would be a large enough percentage to insure a continuing influx of minority members in succeeding decades. (App. 139a)

Thus, the achievement of a 20% minority membership formed the cornerstone underlying the formulation of the Decree.

In order to maintain a relatively constant level of white membership, it was agreed that the locals would not substantially increase their white membership through the acceptance of white transfer applicants. Paragraph 33 (b) of the Decree specifically provided that transfer "determinations shall be made without having the effect . . . of perpetuating the effects of any such past exclusion" (App. 138a). It was understood by all parties that the phrase imposed upon the locals the obligation in exercising their discretionary power to take into consideration the effect that an acceptance might have upon the already existing racial imbalance (App. 145a).

Robert Kennedy was the attorney who negotiated the language of Paragraph 33(b) on behalf of the locals. Ac-

cordingly, in 1975 when the locals received the instant flood of transfer requests, they consulted Kennedy regarding the possible impact that acceptance of such applications might have upon their Title VII obligations. Kennedy advised the locals to reject the applications based upon the following factors:

> 1. the large number of applicants—There were approximately 60 to 100 applications pending at the time;
>
> 2. the large number of potential applicants—There were an additional 1900 potential transferees working within the jurisdiction of the District Council. If the instant applicants were accepted the "floodgates" would be opened;
>
> 3. the current status of achieving minority goals—At the time Kennedy was consulted, the locals had achieved approximately a 9% minority makeup. They should then have achieved a minority level of approximately 12%. At the same time apprenticeship classes were being reduced because the depressed state of the economy made training impossible. The locals were, therefore, already behind their timetable in achieving minority membership as contemplated by the Decree. The acceptance of the transfers would, thus, have had the effect of wiping out the previous gains achieved during the first three years of the Decree. (App. 145a)

After taking the above considerations into account, Kennedy's office authored the Title VII language contained in the transfer applicants' letters of rejection. Hunt agreed that the Kennedy analysis of the locals' Title VII obligations under the Decree was a correct one. Hunt was

also of the opinion that if a total of 90 to 95 white transferees had been allowed to transfer into local membership in 1975, in light of the existing circumstances, the Government would have gone into federal court (App. 143a).

The *Serafin* court also took judicial notice of a determination made by the EEOC on March 31, 1977, which dealt with a charge of reverse discrimination brought by a transfer applicant who had been denied transfer on the Title VII grounds. This Determination (App. 147a) reads as follows in its relevant part:

> It is undisputed that Respondent Local Union and the Commission entered into a Consent Decree that imposes upon Respondent the obligation to increase its membership by 20% minority Journeymen and Apprentices. It is also undisputed that Charging Party is not a member of the minority groups specified in the Consent Decree.
>
> . . . Records show that Respondent's Local Union entered in a Consent Decree, presently in effect, that imposes an obligation to achieve 20% minority membership from 1972 to 1977. Records demonstrate that by accepting Charging Party and other Caucasians on its membership would place Respondent's Local Union in jeopardy of violating its commitments and obligations under the Decree.

B. The New Jersey Courts' decisions

The New Jersey State Courts were unanimous in concluding that the Title VII reason for rejection was "arbitrary" and "capricious". The approaches taken by the respective courts in reaching this conclusion were somewhat different, however. For this reason, the decision of each court will be briefly considered herein.

1. CONNELL—Judge Polow recognized that the purpose underlying the Consent Decree was the achievement of a better racial balance in the membership of the locals. He also recognized that there could be no sweeping ruling requiring acceptance of transfers for two basic reasons: (1) it would further upset the racial balance, and (2) it would interfere with the attempt by the United States to work out some method of obtaining better minority group representation (App. 7a). The Court further acknowledged that it could not properly be concerned with an evaluation of the propriety or effectiveness of the various court orders, or the degree of compliance or non-compliance with said orders (App. 18a).

After correctly stating the above principles, however, the Court then proceeded to completely ignore them. The Court expressly disapproved of the method being utilized to achieve racial balance whereby the white attrition factor was compensated for by the acceptance of whites into the apprenticeship programs (App. 16a). The Court expressed the opinion that the better way to deal with attrition would be by the replacement of members through the acceptance of transfer applicants (App. 16a). The Court further concluded that the local's interpretation of the Consent Decree constituted reverse discrimination, citing *Bridgeport Guardians Inc.* v. *Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), cert. den. 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975) (App. 17a).

2. MUNDY—Judge Furman expressly recognized the existence of a 20% minority goal. He further recognized that the implementation of such a goal might create a conflict between state court considerations as expressed in *Moore* and federal court considerations as expressed in the Consent Decree (App. 36a). The Court, thereupon,

attempted to avoid this conflict by ruling that although there was an understanding, it was not a "binding" understanding (App. 38a). After making this rather tenuous distinction, the Court reasoned that since the commitment was not "binding", it was, therefore, arbitrary for the local to consider it. Judge Furman further stated that the effect of the language of Paragraph 33(b) is to constitute reverse discrimination contrary to a rapidly developing body of law (App. 36a).

3. ESPOSITO—It is unclear from reading Judge Dwyer's opinion as to exactly what factors formed the basis for his ultimate conclusion that the Title VII reason was "arbitrary". The Court did clearly state, however, that the Title VII reason advanced by the Local amounted to reverse discrimination, citing *Lige* v. *Town of Montclair*, 72 N. J. 5 (1976) (App. 61a).

4. SERAFIN—Judge Ackerman basically accepted as true all the testimony introduced by the local regarding its Title VII commitments. He ruled, however, that the implementation of the Consent Decree constituted "reverse discrimination" against plaintiffs (App. 103a). Citing *McAleer* v. *A. T. & T.*, 416 F. Supp. 435 (D.D.C. 1976), the Court reasoned that the union should not be permitted to exclude from membership innocent parties because of the existence of affirmative action obligations which had arisen only because of the local's prior unlawful conduct (App. 104a). The Court concluded, therefore, that the Title VII reasons did not constitute a valid ground for rejection.

5. HANDLEY—Judge Kentz, ruling on a motion for summary judgment, concluded that no quota of minority membership was contemplated by the Decree and that, therefore, no prohibition against acceptance of white transferees was contained in the Decree's provisions (App. 134a).

6. Appellate Division Decision—The Appellate Division affirmed the trial courts' judgments requiring the admission of plaintiffs into local membership. The Appellate Division, however, although "disagreeing" with the locals' interpretation of its Title VII commitments, found that "the civil rights proceedings against the unions gave some basis for refusing transfer" (App. 157a). Accordingly, the Court reversed an award of punitive damages made by Judge Polow and an award of counsel fees made by Judge Furman. Essentially, therefore, the Court concluded that although the locals were mistaken as to their Title VII obligations, the locals had acted in good faith in relying upon this reason in rejecting plaintiffs' transfer applications.

Virtually no explanation was given, however, as to the basis for this disagreement with the locals' position; merely a conclusionary statement to the effect that "there is no basis in the judgment to construe a requirement of 20% as was contended for by each of the locals" (App. 156a). Thus, the Appellate Division, ignored the uncontradicted testimony of Duff, Kennedy and Hunt to the effect that the achievement of a minimum minority membership of 20% formed the cornerstone of the Consent Decree. Apparently, the fact that the goal of 20% was not specifically expressed in the Decree provided sufficient justification for the Appellate Division to disregard the unequivocal understanding of all parties bound by the Decree; i.e., the defendant locals, the United States Department of Justice and the EEOC. Such an approach is, to say the very least, myopic. To conclude that the number of minorities (375) was negotiated without any consideration being given to the percentage minority makeup that such a number would achieve, not only ignores the sworn testimony of all the attorneys who negotiated

the Decree, but totally ignores the practical considerations which enter into the establishment of virtually all affirmative action programs. Numbers, time and percentage goals are the common elements in all such negotiated agreements. The testimony in this regard was clear, convincing and uncontradicted.

The Appellate Division, by concluding that the locals' interpretation of its Title VII commitments was incorrect, conveniently avoided the questions raised regarding an improper collateral attack upon a judgment of a United States District Court. For the reasons expressed above, however, this problem will not disappear simply by pretending it does not exist. The problem is a real one leading to direct state court infringement upon an ongoing United States District Court imposed affirmative action program.

7. Subsequent Federal Applications—After denial of certification by the New Jersey Supreme Court, petitioners applied to the United States District Court for the District of New Jersey for an injunction staying enforcement, implementation or further prosecution of the state court judgments. This application was denied by H. Curtis Meanor, J. U.S.D.C. N.J. on October 4, 1978 (App. 159a). An application was then made to Hon. John J. Gibbons, Circuit Judge, for an injunction pending appeal. This application was also denied by Judge Gibbons, for the express reason that "the subject matter of the appeal has been litigated in New Jersey State Courts to a judgment final in all respects except for a petition for certiorari, and that there are no equitable considerations suggesting why the appellants should not be relegated to the remedy of certiorari" (App. 166a).

Reason for Granting the Writ

This petition raises substantial and important questions regarding the proper role that a state court may exercise in interpreting the meaning, scope and effect of an ongoing affirmative action program established pursuant to a decree of a United States District Court. The trial courts in the instant cases rashly decided one of the most complex, controversial and critical issues to come before this Court in its history, i.e., the question of whether an affirmative action program constitutes reverse discrimination. *Regents of University of California* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733, —— L. Ed. 2d —— (1978). The fact that this federal issue dealing with a matter of grave social importance was decided wrongly is, of itself, sufficient reason for certiorari to be granted. Of even greater significance, however, in terms of its long range implications, is the precedent herein established which allows a state court to seemingly apply its own standards to an affirmative action program ordered by a federal court. The preservation of the integrity of all Title VII orders and decrees is, thus, intimately involved in the within petition.

Only the Appellate Division, of all the state courts which considered this issue, seemed to appreciate the dangerous ground being tread upon in declaring that the denial of transfer applicants because of ongoing Title VII obligations constituted reverse discrimination. The Appellate Division attempted to avoid the reverse discrimination issue by disagreeing for some unspecified reason with the uncontradicted interpretation of the Decree. This Court should not allow itself, however, to be diverted from a review of these cases by this deliberate downplay by the Appellate Division of the federal-state controversy inherent in all the trial court opinions. An issue of such fundamental importance not only deserves, but requires, the prompt attention of this Court.

It is submitted that a state court simply has no authority to declare that the implementation of a validly entered Title VII Consent Decree constitutes reverse discrimination. Such an action constitutes an impermissible collateral attack upon a valid federal judgment and violates all established principles of comity. *Burns* v. *Bd. of School Comm. of the City of Indianapolis, Inc.,* 437 F.2d 1143 (7th Cir. 1971); *Black and White Children of the Pontiac School System* v. *School District of Pontiac,* 464 F.2d 1030 (6th Cir. 1973). This is especially true in the instant matter, where the federal court retained jurisdiction over the operation and implementation of the Consent Decree. The proper avenue for relief, if there were unanticipated problems in the implementation of the court's order, was an application to intervene and a motion for modification of the original decree. *Martini* v. *Republic Steel Corp.,* 532 F.2d 1079 (6th Cir. 1976); *Oburn* v. *Shapp,* 70 F.R.D. 549 (E.D. Pa. 1976), aff'd. 546 F.2d 418 (3rd Cir. 1976); cert. den. —— U.S. ——, 97 S.Ct. 1650, —— L.Ed.2d —— (1977). Such a procedure would have preserved and protected the sanctity of the federal decree. Instead, in the instant matter, the state courts took it upon themselves to unilaterally abrogate the most critical provision, in terms of achieving adequate minority representation, contained in the Decree.

The trial courts compounded their initial error of considering the reverse discrimination issue by ruling incorrectly on the issue. Virtually no analysis was engaged in by the courts before such a complex and important ruling was made—the mere fact that the element of race constituted a factor in the locals' decision apparently being sufficient to justify such a conclusion. The law on reverse discrimination is, however, not quite so simplistic.

The imposition upon labor unions of minority membership quotas or good faith goals has long been sanctioned by the federal courts. *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *Rios* v. *Enterprise Ass'n. Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974); *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), cert. den. 404 U.S. 984, 92 S. Ct. 447, 30 L. Ed. 2d 367 (1971). In all of the above cases, challenges to the court ordered action under either the due process or equal protection clauses of the United States Constitution or the statutory provisions of 42 U.S.C. §2000e-(2) (h) and (j) were considered and rejected by the Courts. Thus, the mandating of minority membership goals does not of itself constitute reverse discrimination, as the trial courts intimated.

A multitude of factors must be considered before making such a determination. *Regents of University of California* v. *Bakke, supra.* For example, it is well established that the interpretation given to a decree by the agency charged with its enforcement must be given great weight. The state courts ignored this principle by disregarding the EEOC determination that the rejection of transfer requests based upon Title VII commitments under the Consent Decree does not constitute reverse discrimination (App. 147a). The State Courts' conduct highlights the extent of the intrusion made by them upon the efficacy and continuing vitality of the Consent Decree. The fundamental and sensitive nature of the issues raised herein requires, therefore, a full review by this Court.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Oral Decision of Polow, J.S.C., October 27, 1976

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION—SUSSEX COUNTY

DOCKET NO. C 4434-74

October 27, 1976

GEORGE CONNELL, *et al.*,

Plaintiffs,

v.

LOCAL UNION NO. 483, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO, *et al.*,

Defendants.

Before:

HONORABLE BERTRAM POLOW, J.S.C.

Appearances:

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Oral Decision of Polow, J.S.C., October 27, 1976

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PHILIP FISHMAN, C.S.R.
Official Court Reporter

The Court: I have, of course, listened carefully to all the evidence. I have examined the documents. I have listened to counsel. I obviously have a responsibility and to some extent, of course, the role of the Court has been explained by our Supreme Court in *Moore*. The case is on remand from our Supreme Court in the matter originally entitled Moore v. those two defendants, the Local 483 of the International Association of Bridge, Structural and Ornamental Ironworkers, the AFL-CIO and the other defendant again is the International Union.

On February 14, in fact, 1975 the matter was remanded to the trial court with directions that an order be entered requiring the local union to reconsider the applications of the plaintiffs in that case for transfer into the local union in accordance with the view expressed in the opinion of Judge Collester and further the Supreme Court ordered

Oral Decision of Polow, J.S.C., October 27, 1976

that in the event of rejection of any such application for transfer, the reasons must be stated for the rejection to provide a basis for a fair and impartial review by the International General Executive Board in accordance with the constitution of the International.

Now, another suit was started in the interim since the decision in *Moore* and all the plaintiffs in both suits appear now before this Court. The suits were consolidated by consent and for some reason, which I am not quite familiar with and it has nothing to do with the determination in this case, a different name appears first, Connell instead of Moore, and so that the titles are somewhat different.

There are now 29 plaintiffs, I understand, who are in the same or similar positions, although their status is somewhat different based upon what efforts were made, what reasons were given for rejections and whether or not any formal appeal was made from the rejection to the International. It is clear that none of these 29 plaintiffs was approved for transfer into Local 483.

The Moore trial took place in this courtroom, I believe, in or about December 1973. The trial judge found that the practice of Local 483 in rejecting all applications for transfer constituted an abuse of discretion. However, the trial judge also ruled that the Chancery Division of the New Jersey Superior Court lacks jurisdiction to intervene in the internal affairs of the union and, therefore, no ultimate relief could be granted.

He relied on *Mayer* v. *Journeyman Stonecutters Association*, which is reported at 47 N. J. Equity 519 and was apparently decided in 1890. Accordingly the trial judge entered a judgment in favor of the defendants and on

appeal the Supreme Court determined that *Mayer* was not applicable and furthermore indicated that conditions have substantially changed since the *Mayer* decision in 1890.

According to the Supreme Court in *Moore,* although our courts have traditionally refrained from interfering with the internal affairs of unions, they nonetheless will and have the obligation to intervene when the provisions of a union constitution are repugnant to public policy or exceed the limits on equal opportunity to work guaranteed by the State and Federal Constitution or where they are interpreted in such a way as to in fact be repugnant to public policy or deprived parties or persons of the equal opportunities guaranteed by the State or Federal Constitution.

Thus the Court concluded that the exclusion of qualified persons for membership in an organization where such membership is a matter of economic necessity is to be dealt with as stated in *Falcon;* that is, *Falcon* v. *Middlesex County Medical Society* reported at 34 N. J. 582 in 1961, and there it was held that a county medical society cannot arbitrarily exclude a duly licensed and qualified physician from membership.

Following that in 1963 in *Greisman* v. *Newcomb Hospital* at 40 N. J. 389 (1963) the Court noted that the hospital's power to pass on staff membership is a fiduciary power and an applicant is entitled to be evaluated on his individual merits without regard to certain restrictive by-law requirements.

The Court found a similarity in *Moore* between the union and the county medical society or hospital based upon the fact that they each effect the economic welfare of the individual applicant and all have public importance.

Defendants here would make some distinction because they argue that there is no economic advantage to local membership. They deny any relative advantage in membership in the union itself because all the applicants for membership in this case or at least theoretically to all the economic advantages as non-members which are available to those who are in fact members of the local, argue that they all work and are assigned work out of the same hiring hall and the same list.

Be that as it may, however, as I see it, our Supreme Court has already resolved that issue in *Moore,* our Supreme Court having stated specifically that there is an economic advantage in membership in the local and, I think, that this Court is bound by that determination and even regardless of that determination, this Court cannot help but conclude that the advantages are greater than merely the relief from the paying of the two-and-a-half-dollar weekly travel service fee. The fact that it is obvious that all ironworkers aspire to membership in the local union in the community in which they live or work obviously permeated the entire proceedings in this courtroom. The 29 plaintiffs in this case feel very strongly that they would have an advantage or surely would not have gone to the time and trouble involved, expense of pursuing this litigation. Beyond that it is clear that over the years members of the locals—at least in this area—have seen fit to attempt to restrict their membership for reasons which may to them be significant. Surely they cannot deny that there is a desirability in holding membership.

I previously referred to the decision in California in *Director's Guild of America, Inc.* v. *Superior Court,* 409 Pacific 2d 934 where the Court declares at 941 that membership in the union means more than mere personal or

social accommodation. Membership affords the employee not only the opportunity to participate in the negotiations of contracts but also the chance to engage in the institutional life of the union. In the case, of course, which involves interstate commerce the union must legally give fair representation to all the appropriate employees, whether or not they are members of the union, the union official, in the nature of political realities, will in all likelihood more diligently represent union members, who can vote him out of office, than employees whom he must serve only as a matter of abstract law, and the Court referred to an article in the *Columbia Law Review* in 1947: The right to join a union (1947) 47 *Columbia Law Review* Page 33. "Participation in the union's affairs by the workman compares to the participation of the citizen in the affairs of his community. The union, as a kind of public service institution, affords to its members the opportunity to record themselves upon all matters affecting their relationships with the employer. It serves likewise as a vehicle for the expression of the membership's position on political and community issues. The shadowy right to 'fair representation' by the union is by no means the same as the hard concrete ability to vote and to participate in the affairs of the union."

Obviously that explains some of the motivations behind both the desire, the strong urge on the part of these applicants to transfer into the local and, on the other hand, the antipathy these unions have shown and in fact one of the witnesses testified, although with regard to another local, for allowing transfers into the respective locals.

Surely there are advantages and our Supreme Court was right in concluding that there are economic advan-

tages in union membership. On the other hand, of course, this Court does not conclude that based upon that logic automatically all journeymen applicants must be admitted to the local union. That would also raise difficult social and economic questions and any such sweeping ruling could have adverse effects on the union by way of an influx of people who could distort the function of the union local itself and, of course, it could have important possible consequences on the primary subject of the testimony in this case, specifically, the civil rights issue and the desirability of obtaining a better racial balance, so that there can be no sweeping ruling requiring acceptance of all applicants for transfer who might happen to be members, journeymen members, of the international, that not only might upset the racial balance further but might at the outset interfere with the attempt on the part of the U. S. Government to work out some method of obtaining better minority group representation.

In any event, this Court is limited to act within the scope of the ruling in *Moore* by our Supreme Court. Our authority is surely circumscribed and within those limits this Court must determine whether the reasons for rejection is at this time, provided by the local, reviewed in accordance with the outlines of the *Moore* decision by the General Executive Board of the international and in accordance with the provisions of the International Constitution, whether the reasons given should be reviewed by this Court for arbitrariness or reasonableness and perhaps also whether the mandate of our Supreme Court requiring, as I read it, that proper standards or guidelines or criteria be established has been in fact followed and ultimately whether the International Executive Board has reasonably exercised its discretion.

It has been conceded that as a matter of record that at least 22 of the 29 plaintiffs did make application for transfer into the local and that they were rejected.

Now, with regard to the rejection, 15 of them were apparently rejected solely on the basis of the Federal Court ruling and the interpretation of counsel that acceptance of any of these applicants would be violative of either the spirit or purpose or the letter of those rulings. An additional seven were rejected for additional reasons as outlined by Mr. Lynes, having to do with untruthful statements, I believe, and those rejected applicants did file appeals with the International General Executive Board which declined to reverse the action of the local executive council. There were other plaintiffs who either failed to file any applications on the grounds that they would be futile or failed to seek their Appellate review for the same reason on the grounds that it would be futile and that the local and international had made it clear that they would not approve no application for transfer.

Now, the local at first gave four reasons for its actions. I understand, as I have just indicated, that only two of those reasons are pressed by the local. As far as the international is concerned, it presses only one, that dealing with the civil rights issue.

It's stated as follows:

Admission of each plaintiff would cause a further imbalance in the minority makeup of defendant local and would therefore adversely effect the continuing Title 7 decree entered in the case of *U. S.* v. *Plumbers,* such orders or decrees having been predicated upon assurance of defendant Local 483 that the minority makeup of all

northern district ironworker locals will reach 20 per cent during the period between 1972 and 1977. Therefore, to preserve this ratio no white members can be admitted into Local 483.

During the course of the trial this statement was somewhat modified to suggest that the intent was at this time as stated. However, the reason seems to be permanent and irrevocable. Now, that is only important in my attempt to interpret the motivation and justification for the stated reason.

Now, do I have the power to determine first whether that reason is arbitrary or reasonable? We surely have some support in this State without relying solely on *Moore.*

With regard to *Moore,* the Court discussed the importance of the local setting forth reasons for review by the international for arbitrariness or reasonableness. The Court seemed to assume that that would be sufficient and the problem would thereby be solved. It did not take the next step and suggest that this Court has the power to review the action of the international for arbitrariness or unreasonableness. However, I cannot conceive of the Supreme Court having suggested that the matter be reviewed and that this Court has the power to set aside an arbitrary act if in fact it did not conceive that this Court would exercise that power if necessary in this particular situation.

In 1967 there was a decision in *Ferger* v. *Local 483* and the Appellate Division affirmed the trial court's ruling which would surely support the conclusion that this Court may review the actions ultimately barring transfers as sought in this case.

Back as far as 1943 in *Carroll* v. *Local No. 269* decided in 133 N. J. Equity 144, the Court enunciated common law principles including the recognition that courts do not exercise general powers over voluntary associations. However, that a complete prohibition against review by the Court would be obsolete as applied to unions. That may be considered as dictum because in that case there was no relief when there was an agreement that the plaintiffs be allowed to apply for membership and work unmolested. However, the language is surely significant and perhaps even more significant now than when it was stated by the Court, and I quote:

"If the characterization of a labor union as a voluntary association becomes in time a mere anachronism, the mere word 'voluntary' will not likely preserve the present state of the law.

"It is wise to foresee that a change in surrounding circumstances such as the economic strengths of competing groups, may make the existing law disjointed and an instrument of oppression if strictly adhered to.

"It is the peculiar genus and strength of the common law that no decision is *stare decisis* when it has lost its usefulness in our social evolution; it is distinguished, and if times have sufficiently changed, overruled Judicial opinions do not always preserve the social statics of another generation."

Our Supreme Court surely recognized the obligation of the courts of this State to act and protect what it designated as the property rights of journeymen, members of the international union, who are economically dependent upon collective bargaining contracts, which in this case, of

course, would be negotiated by Local 483, in that their applications for transfers be fairly and properly considered. A rejection of an application for transfer must have a reasonable basis. Transfer should not be barred because of a decision to restrict membership to those who have participated in an apprenticeship program. I have not decided that on my own. I have taken that from the ruling of the Supreme Court. I am not sure that the union as yet understands it so I will repeat it. Transfer of membership should not be barred because of a decision of the union to restrict membership to those who have participated in an apprenticeship program. So the question then remaining is whether these rejections based primarily on the allegation that the stipulation and consent decree in the Title 7 action in the federal courts bar all transfers of white members into 483 and that, in any event, transfers of white members would be a violation of the spirit, if not the letter, of the intention of the Court.

Is that interpretation supported by the proofs? If not, is it a fair and reasonable basis for rejection, whether or not required by the language of the decree, stipulation and amended decree?

The local argues that Title 7 decree was predicated on an agreement between counsel for the local and the international or, I suppose, counsel for the Northern New Jersey District, the international and government counsel.

Now, that agreement was based upon a desire of the Federal Government to obtain better racial balance, that certain assurances were given to the government in that the union has an obligation to live up to its promises.

I think Mr. Duff referred to a moral obligation on his part to keep his word. If it is the local's position that it

is a moral, if not a legal, requirement on their part, the international joins the argument of the local but also adds to it the fact that it cannot be held liable for anything in the absence of fraud or malice because in performing its duties under the union constitution it is acting as an appellate tribunal deciding an appeal from an administrative agency and, therefore, it cannot be held for damages even if they are wrong. They rely on *United Mine Workers* v. *Gibbs* reported in 383 U.S. 715 to establish that the liability of the international for actions by the local must be established on the basis of clear proof of actual participation or actual authorization of such acts by the union.

Of course, in this case there is no question about knowledge. The question is whether there was in effect a conspiracy. A conspiracy obviously may be proved by circumstances without having to show specifically an oral or written agreement.

Defendant also relies on *Gavin,* which is, as I understand it, an unpublished opinion which has been supplied to the Court and which has been referred to by counsel in which it was determined that the decision of the local to hold up transfer applications or hold them in abeyance was supported by the Court. I indicated before that it did appear during the course of the trial or at least during summations, that there was a suggestion that the rejections were intended to be at this time not final and irrevocable.

The language of *Gavin* is interesting. The Court stated that a consent decree was entered on June 26, 1973 by order of the United States District Court, Northern Illinois. Among other things, the decree imposes upon the

local an obligation to exercise good faith efforts to achieve over the next several years numerical goals of active black journeymen and apprentice members. Though the local is not prohibited from admitting into membership members of other ironworker locals under the provisions of the international constitution and upon such conditions as Local No. 1 may require, the decree specifically provides that the admission of new white members will not relieve the local of its obligations to meet the goals set forth.

The Court, of course, emphasized the discretion vested in local unions by the international constitution. It upheld that discretion in that case, although it was clear that the consent decree in that case did not purport to prohibit transfer of members.

However, I cannot say that that decision applies to the facts as I find them in this case. In this case it seems to me that we have clear proof. As a matter of fact, we have a ruling by the Supreme Court upon which I cannot conclude anything but that traditionally there has been a deliberate, definite policy of excluding transferees except as I noted previously in the case of relatives of existing members. That policy was condemned by our Supreme Court as arbitrary and unreasonable and I cannot say that in this case the defendants did anything but use the consent decree and stipulation as a deliberate means of continuing the very policy which has been condemned by our Supreme Court, and I will be more specific.

The crucial document upon which defendants rely is, I believe, the stipulation. I think it is clear and not much need be said about the fact that the original order would have permitted all transferees without limitation. The original order would have also permitted or required,

mandated, admission to all who had completed only six months of training.

Now, I am perfectly satisfied that neither of those results was contemplated by either party and, therefore, some amendment was obviously necessary. The parties agreed on the manner of amendment and the stipulation and consent decree provides that Paragraph 33A be stricken and this be substituted.

Paragraph 33A originally provided full journeymen membership to anyone who completed six months experience. The amendment limited the effect of that provision to any black or Spanish-surnamed American.

Now, pursuant to the discussions, there was an order requiring admission of no fewer than 75 minority applicants every year for a period of no less than five years and no less than 25 minorities in the apprenticeship program.

Now, there has been testimony allowed concerning the discussions which led up to the final requirement for 75 minority applicants per year for five years and this was over the objection of the plaintiffs and that testimony was introduced to support the contention of defendants that the basis of the number 75 was the ultimate desire to reach a ratio of 80 whites to 20 minorities within the designated five-year period.

I have in my colloquy with counsel indicated that my recollection of the testimony is that they rounded out the numbers to the extent that they began with a figure of approximately 1400 members as of the time of the discussions in the five locals making up the Northern New Jersey District and that they considered that with the

expected growth and making allowance for attrition, as we have indicated, by way of retirement on pension, by way of transfers out by way of termination and by way of death; that a certain number of new members would be admitted each year but that at least 75 of each of those years be members of these designated minority groups to the end that at the end of the five years there would be at least 20 per cent minority membership.

Now, just by simple mathematics, of course, if 375 is 20 per cent and then the total anticipated membership would have been approximately 1900, I think that five times 375 is 1875. So that there was at least an anticipated total growth of 500 members over the five-year period and making allowances for the obvious attrition rate and, as I have said, I do not recall any specific testimony as to what that rate is. Nevertheless, it is clear that it was anticipated that there be at least as many new white members as those contemplated among minority groups.

Now, defendants insist that the purpose of the amended decree and stipulation was to bar all white transfers at least until the desired goal had been reached or I suppose that the alternative in that their argument is that in any event allowing white transfers would frustrate the attempt to achieve that stated goal. In fact, of course, the local has not come close to meeting the requirements of the order. The district has not come close to meeting the requirements of the order. At no time has there been 75 minority members admitted. Even immediately following the entry of the order and the stipulation and the consent decree in the first year, according to the evidence, 73 whites and 33 minority members were admitted as

apprentices and 29 minority trainees started in July 1973. Somehow or other 18 months elapsed. There were no other new members admitted into any program until January 1975, the only other class admitted since the order, and that class consisted of 42 white members and 23 minority members in the apprentice category; 20 minority trainees. At this time the testimony is to the effect that Local 483 has seven journeymen blacks, seven apprentice blacks among its 143 active working members. Apparently, according to the testimony, the membership also includes pensioners, although their status is not entirely clear.

Obviously, both the district and the local have failed to live up to the consent decree, according to the testimony at least partly because of economic conditions, although even at the very outset, as I have indicated, the very first class selected in October 1972 failed to comply and surely the selection in October 1972 presumably pursuant to the Title 7 order of 1973, the number of white apprentices against a lesser number of minority people contradicts counsel's suggestion that no new white members were to be contemplated at all. All the white new members of the union since the *Moore* decision came through acceptance by the union local itself. None were transferees. There was no apparent equivalent policy adopted by the union to hold down white new membership equivalent to its policy as stated here to allow no transfers of white members until the racial balance is achieved.

There is no basis that I can see that has been presented to this Court for this kind of discrimination, absolute prohibition against white transfers, no policy at all restricting white new members based upon this racial balance problem.

Our court in *Moore* has already held that the union constitution clearly contemplates that journeymen members of the international union should be permitted to transfer to another local union. It further held that membership in the local is a matter which critically affects the person's ability to earn a living and that a competent journeymen who is a member of the international should not arbitrarily be precluded from transfer of membership.

Mr. Craner has referred to the Local 638 decision reported in 532 Federal 2d 821 (1976) and it seems to me that it does have some relevance here and I intend to quote two paragraphs on Page 828. The first is a quote from the *Bridgeport Guardians* case as follows:

"The imposition of quotas will obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes."

The other quote is the following:

"The smaller group participating in a civil service examination, the more pointed the problem of reverse discrimination becomes. We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights."

Now, this, of course, supports his argument concerning the difference in dealing with an unidentifiable group such as prospective new members who are not yet applicants and a very specific small identifiable class, those who are already members of the international and made application for transfer.

With regard to the Title 7 proceedings, I am unable to find in any of the documents submitted in evidence, either the original opinion, stipulation, the amended decree, or any of the agreements which were testified to, any intention to absolutely bar white transferees. Surely, the rationale behind the Federal Court orders is most desirable and will in all respects be supported by this Court to the extent that this Court has the power or authority to do anything about it. Surely, racial balance should be achieved. However, other than some references in the testimony here, the economic conditions and the dropout rates, there really has been no satisfactory explanation for the failure to come closer to achieving that goal nor has there been any explanation whatever as to why new white membership should be permitted in the face of this desire to achieve racial balance, but all transfers of journeymen members should be barred or prohibited.

It seems to me that any restrictions on new white memberships should apply more stringently to those who have not yet been trained or appenticed or if not more stringently at least equally to new and old union membership alike, to apprenticeship and transfer membership alike.

Our Court has also held and directly stated in *Moore* that transfer of otherwise competent journeymen members should not be barred because of a decision to restrict membership to those who have participated in an apprenticeship program.

It is not the proper role of this Court, as counsel have stated and as I think I have repeated, to evaluate the propriety or the effectiveness of the various Federal Court orders nor may this Court concern itself with the decree of compliance or lack of compliance by the union local or

international or district council to the mandates, whether they be explicit or inexplicit in those orders or decrees.

However, this Court does have a mandate imposed by our own Supreme Court to determine whether the provisions of the constitution of the international had been complied with with respect to transfer applications. Our Court indicated that there should be guidelines and criteria for exercise of discretion and acceptance or rejection of transfer application.

I have heard no evidence that the international has complied with that mandate. I had no testimony that any such policy including standards, guidelines have been adopted. I have indicated and I find as a fact, that there has been traditionally a policy of absolute prohibition against transfers into the Local 483. This has become an absolute prohibition, apparently, since 1968. A reading of the decision in *Moore* indicates that prior to that there were some transfers permitted except that they were limited to relatives of then existing local members. I find that this practice has continued since the *Moore* decision without any kind of modification, although, I suppose, some effort has been made to show pro forma compliance. I refer to the fact that rather than having rejected these applications out of hand without giving any reason whatever, that the local apparently did arrange to have interviews and sent out letters containing reasons. In my opinion that is no more than pro forma compliance. I cannot conclude anything but a continued intention to continue the tradition of barring and prohibiting transfers while adopting a color of compliance, pro forma compliance. Of course, there has been no evidence of even one approval of a transfer. As a matter of fact, there has

been an admission that there is no intention to approve any transfer.

I have already interpreted all of the Federal Court rulings as not intended to absolutely bar transfers of white journeymen members nor to discriminate between new apprenticeships and transfers of journeymen as among white persons in the effort to achieve racial balance. Therefore, I find that both the local and the international have arbitrarily rejected all transfer applications and have failed to exercise reasonable discretion.

Now, with regard to the defense by the international that it acted as an appellate review board and has not been shown to have been guilty of fraud, bad faith or malice.

There has been testimony in this case that not only Local 483 but in fact other locals, at least one in particular, had a firm policy of prohibiting all transfers in favor of graduates of their own apprentice programs. I cannot conclude otherwise and I find as a fact that it is a reasonable inference that the international knew of this policy. Surely the international is charged with knowledge of the ruling of our Supreme Court that any such policy is arbitrary and unreasonable. The international also had complaints by some of the applicants alleging specifically that a policy existed limiting transfers to relatives of existing members of the local. The international saw fit to ignore all of this and sent a form letter using the Title 7 court action as its justification.

I am satisfied and I find as a fact that the actions of the international in doing so was in knowing conspiracy with the known and stated policy of the local to bar all

transfers, which policy was held by our courts to be arbitrary and unreasonable.

Counsel argued that since the International Executive Board knew none of the applicants individually or personally it could not have been based upon prejudice against any of them—its determination could not have been based upon bias or prejudice against any of them individually. However, I find that bias and prejudice did exist at least to the extent that there was clear bias and prejudice in favor of the improper policy of Local 483 which the international encouraged and approved.

The international has, of course, also failed to comply, as I have indicated, with the mandate of our Supreme Court to establish criteria standards for the exercise of discretion having failed to take steps to modify the preexisting policy which has been condemned by our Supreme Court, having in fact encouraged and approved the continuation of that policy in the face of a firm declaration by our Supreme Court that it was arbitrary and discriminatory. I am satisfied that both defendants have acted in an arbitrary and unreasonable manner.

Now having so held the question is what is the next step within the authority and power of this Court. May this Court establish for the defendants proper standards and guidelines and criteria? I feel not. Too many cases have been cited with regard to the reluctance of the Court to interfere in the internal operations of a union organization. However, despite that reluctance, there must be something that the Court has power to do to compel compliance. There surely must be a policy adopted when mandated by the Court. Such a policy must in this case include a recognition that our Supreme Court has ruled

that there may not be an absolute prohibition of all transfers of journeymen, members of the union, and the policy should combine, it seems to me, an intelligent reasonable approach to achieving some racial balance by controlling both new membership among apprentices as well as trainees and I understand that the trainees are limited to minority groups only and transferees.

Surely, as I have already indicated, there may not be a more stringent bar against white transferees than the bar against new white trainees for apprentices. I find that the reasons stated for rejection of the seven applicants, in addition to the racial balance reasons as set forth by the local, have been or in fact would have been overruled by the international had it been reviewed and, therefore, those reasons are academic and need not be considered by the Court.

So what remedy is appropriate under these circumstances? I am going to order that the defendant international adopt a policy containing standards and criteria as originally mandated by the Supreme Court in *Moore* within 30 days. I am going to order that within 90 days all of the 29 plaintiffs be considered or reconsidered by the local executive council as under the terms of the international constitution in a reasonable manner. Hearings may be held if desired by the local provided each of the plaintiffs receives adequate and reasonable notice; that each plaintiff is to be dealt with individually, receive notice in writing, that the hearing be conducted in a reasonable and fair manner and that thereafter findings in writing together with the reasons therefore with reference to the policy to be adopted by the international, be provided to each of the plaintiffs applying to each plaintiff individually.

Now, each of these steps must be completed within the 90-day period. Failure to comply in full within the timetable I have set forth will be considered an acceptance of the transfer application without further proceedings provided, of course, that the plaintiffs make themselves available as reasonably required and cooperate with any reasonable appropriate demands.

In cases where such applications are rejected in writing within the 90-day period pursuant to the newly adopted policy as contemplated herein and upon written notice of appeal, the defendant international must act within 30 days after receiving such notice and again should the defendant international fail to act, that will be considered a determination in favor of the applicant without further proceeding.

With regard to the claim for damages, counsel has sought to have me hear further argument and perhaps provide further testimony. There will be no consideration of compensatory damages since this Court will not usurp the proper function of the defendants in adopting policies and properly evaluating each applicant with a view to reasonable acceptance or rejection based upon proper standards and criteria including the problem of achieving racial balance and the goals as stated during the testimony in this case as may be appropriate, although may not, as I have already stated, absolutely bar reasonable transfer applications.

No compensatory damages will be considered since I cannot make any finding with regard to any particular applicant and I will not, therefore, consider any proofs in that connection.

I should state in passing, of course, that the proofs in this case indicate that all applicants have been given work opportunities through the local hiring hall although, of course, defendants still insist that they suffer economic disadvantages without local membership. In any event, compensatory damages will not be considered in this case for the reasons I have stated.

However, there is also a demand for punitive damages.

In the case of *DiGiovanni* that is reported in 55 N. J. 188 in 1970, our Supreme Court indicated that ordinarily damages are intended to compensate rather than to punish. In exceptional cases, however, punitive damages are awarded as a punishment of the defendant and as a deterrent to others from following his example.

Further it says:

"Something more than the mere commission of a tort is always required for punitive damages. There must be such a conscious and deliberate disregard of the interests of others that his conduct may be called willfull or wanton.

"Our cases indicate that the requirement may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences."

In this case I have found that the defendants have deliberately, knowingly and with the intent to deprive the applicants of property rights which have been enunciated by our Supreme Court and that they intentionally conspired to continue this condemned local traditional policy to absolutely prohibit transfers except for relatives of members.

I am satisfied, therefore, that there is a reasonable basis for punitive damages. I am going to award the sum of $500 for punitive damages for each of the plaintiffs who made application to the local union against the local union in this case for having arbitrarily rejected those applications. I am going to award damages against the international in those cases where appeals were taken to the international and the international upheld the decision of the local.

There is also an application before me for counsel fees. Counsel have relied on the decision—Mr. Craner has cited a decision which I do not have before me.

Mr. Craner: *Red Devil Tool* v. *Tip Top Brush Co.*

The Court: All right. That decision, I recall, was a 1965 decision prior to the enactment of the present rules.

According to Judge Pressler, the latest modification of that rule in 4:42-9 was to clarify the previous confusion and eliminate the abuses, and I quote here, "of the pre-1948 chancery practice by limiting an aware of counsel fees to a few specified situations." I see that *Red Devil Tools* was cited in 1967 in 50 N.J. 563. The new rule was adopted subsequently and I am perfectly satisfied to eliminate the awarding of fees in situations of that kind. I surely agree with Judge Pressler's comment. However, there is an area where the Court has the right to act.

The plaintiffs in this case are all members of the international union. As members they act not only in their own individual behalf and obviously they have an individual interest, but they act on the behalf of anyone else who is in the same situation.

Judge Pressler discusses that problem as well and refers to *Sunset Beach Amusement Corp.* decided in 33 N.J. 162.

"'Fund in court' is not to happy a term," says our Supreme Court. "It is a shorthand expression intended to embrace certain situations in which equitable allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs. The difficulty with the term is that literally it may connote a fund within the precincts of the court in a physical or geographic sense whereas 'in court' refers to the jurisdictional authority of the court to deal with the subject matter." Citing cases. "And for that matter, the existence of power in the court to control the subject matter is not itself enough to demonstrate the existence of a 'fund in court' within the purpose of the rule.

"In general, allowances are payable from a 'fund' when it would be unfair to saddle the full cost upon the litigant for the reason that the litigant is doing more than merely advancing his own interests. Thus, for example, when there are classes of claimants to the fund and the services redound to the benefit of others as well, it is fair that all contribute to the cost by a charge against the subject matter. Typical is a controversy among stockholders with respect to dividend rights in the surplus of a corporation."

Now, I cite this because I don't believe that Mr. Parsonnet has had an opportunity to respond to that.

I am going to order or I am going to permit, I should say, Mr. Craner to submit an affidavit of services. I am also, however, going to give Mr. Parsonnet an opportunity to respond to the comment which I have just

made concerning whether or not this Court has the power to or should under the circumstances award counsel fees to these plaintiffs as members of the international. I suggest that both of those things be done within the next ten days.

I would like counsel then to submit a form of judgment accordingly.

Mr. Craner: Your Honor, may I ask the Court one question that has come to mind and I think it should be clarified immediately.

There are other individuals who have applied for transfer into Local 483 who have been rejected for identically the same reasons as the plaintiffs herein.

What is the status of those persons with respect to the criteria and review?

The Court: Mr. Craner, you are a very competent member of the New Jersey Bar. I have dealt with the cases before me. You will give legal advice to anyone who seeks it properly from you.

Mr. Craner: Very well, your Honor. Thank you.

Mr. Parsonnet: Your Honor has allowed 30 days within which action must be taken by the international.

The Court: Extending a policy.

Mr. Parsonnet: Yes.

The Court: You have a couple of years, Mr. Parsonnet. The Court says specifically that you are to adopt standards and guidelines and criteria. Have you done so?

Mr. Parsonnet: No, sir. My only question is may I have 30 days from the date of receipt of the transcript.

The Court: From date of the receipt of the transcript? That could be three months from now.

Mr. Parsonnet: I don't know how else I can call your Honor's ruling to the attention of my client.

Oral Decision of Polow, J.S.C., October 27, 1976

The Court: You see, what you can do, and if this transcript is held up for an unreasonable length of time, you can make an appropriate application.

Mr. Parsonnet: Thank you.

The Court: I am going to ask the Court Reporter—I take it that you are immediately going to order a transcript.

Mr. Parsonnet: Yes, of course.

The Court: I am going to ask the Court Reporter to make it his business to make that available as quickly as possible.

Mr. Parsonnet: Thank you, sir.

The Court: We will stand in recess for lunch.

* * *

I hereby certify the foregoing.

PHILIP FISHMAN, CSR
Official Court Reporter

Judgment

(Filed—March 17, 1977)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—SUSSEX COUNTY
CIVIL ACTION

CONNELL, *et al.*,
Plaintiffs,

vs.

LOCAL UNION NO. 483, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL-CIO, *et al.*,
Defendants,

DOCKET NO. C-4434-74

and

HESPELT, *et al.*,
Plaintiffs,

vs.

LOCAL UNION NO. 483, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL-CIO, *et al.*,
Defendants.

DOCKET NO. C-2157-75

Judgment

This action having come on for trial before the Court, sitting without a jury on October 20, 21, 25, 26, 1976, and the Court having also heard motions for reconsideration of judgment thereafter, and having directed defendant Local 483 to reconsider the applications of plaintiffs in accordance with the oral decision of this Court dated October 27, 1976, and the matter having been submitted to the Court for final disposition on January 24, 1977, and the Court having heard the evidence and the argument of the attorneys for the respective parties and having announced its decision in open Court on October 27, 1976 and on January 24, 1977, and being of the opinion that judgment should be entered in favor of certain plaintiffs for the relief demanded in the Complaint;

It is on this day of February, 1977, ORDERED that judgment be entered as follows:

(a) Defendants shall be directed to immediately accept the transfer applications and admit into membership at Local 483 the following plaintiffs: Elio Rossi, Patrick Turi, Antonius Winkens, Roland Donaldson, Andrew Milmark, George Connell, Joe Lee Moore, John Shouldis, Alexander McClellan, James O'Keefe, Joseph Lanzalotto, Ronald Jehlen, Raymond G. Jehlen, Rudy DiGiorgio, William Wharrie, Joseph Foley, Michael Cheselka, Robert Farro, Gregg, Eck, and William O'Neill.

Defendants shall be required to process the plaintiffs above named forthwith and to comply with the Constitution of the International Union insofar as the proper procedure for transfer is concerned and to forthwith submit to each plaintiff indicia of membership in defendant, Local 483.

Judgment

(b) The following plaintiffs are hereby awarded damages in the amount of $500.00 each as against defendant, Local 483, as and for compensatory and punitive damages:

George Connell, Joe Lee Moore, William O'Neill, Anthony Cucci, Roland Donaldson, John Shouldis, Antonius Winkens, Joseph Mahon, Ben Geshensky, David Gregory, Jack Hespelt, Eitel Hespelt, Michael Cheselka, Alexander McClellan, Raymond G. Jehlen, Patrick Turi, Andrew Milmark, Ronald P. Jehlen, James O'Keefe, Joseph Lanzalotto, Elio Rossi, Donald Seaburg, George Janesek, Gregg W. Eck, Rudy DiGiorgio, Richard A. Ruby and Robert A. Farro.

(c) The following plaintiffs shall be entitled to receive the sum of $500.00 from defendant, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, as and for punitive damages:

George Connell, Joe Lee Moore, William O'Neill, Anthony Cucci, Roland Donaldson, John Shouldis, Antonius Winkens, Joseph Mahon, Ben Geshensky, David Gregory, Jack Hespelt, Eitel Hespelt, Michael Cheselka, Alexander McClellan, Raymond G. Jehlen, Patrick Turi, Andrew Milmark, Ronald P. Jehlen, James O'Keefe, Joseph Lanzalotto, Elio Rossi, Donald Seaburg, George Janesek, Gregg Eck, Rudy DiGiorgio, Richard A. Ruby, and Robert A. Farro. Plaintiffs William Wharrie and Joseph Foley shall not be entitled to $500.00 damages from the International Union having not appealed to said body.

(d) Plaintiff's applications for counsel fees are hereby denied on the ground that this Court lacks the power to grant such an application in accordance with the rules of Court.

(e) Costs of suit to be taxed.

BERTRAM POLOW, J.S.C.

Oral Decision of Furman, J.S.C., November 9, 1976

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MIDDLESEX COUNTY
DOCKET NO. C-2156-75

PHILIP W. MUNDY, *et al.*,

Plaintiffs,

v.

LOCAL UNION NO. 373, *et al.*,

Defendants.

New Brunswick, New Jersey
November 9, 1976

Before:

HONORABLE DAVID D. FURMAN, J.S.C.

Appearances:

Craner, Brennan & Nelson, Esqs.,
By: John A. Craner, Esq.,
Attorneys for the Plaintiffs

Nolan, Lynes, Bell & Moore, Esqs.,
By: Jerome M. Lynes, Esq.,
and
John J. Mulvihill, Esq.,
Attorneys for the Local

Oral Decision of Furman, J.S.C., November 9, 1976

Parsonnet, Parsonnet & Duggan, Esqs.,
By: Thomas L. Parsonnet, Esq.,
and
Harold Stern, N.Y. Bar,
Attorneys for the International.

STANLEY GRABON, C.S.R.

The Court: This is an action to compel Local 373 of the Iron Workers to admit twenty-seven plaintiffs to membership in the Local. It is also for incidental damages and for punitive damages.

All twenty-seven, applying in 1975 after the *Moore* decision of the New Jersey Supreme Court, were rejected by the Local. A number of them appealed. I haven't totaled it up, but I believe around twenty or twenty-two appealed to the International. All were rejected by the International.

The grounds of rejection by the International were confined to the effect of the consent decree of the Federal District Court.

The grounds of rejection by the Local were twofold. One is that the testimony before the Executive Board indicated no fromal training in the various phases of iron working, and that the applicants had never been tested as to his capabilities; in addition, he would not qualify as an all around journeyman iron worker; plus the effect of the Federal District Court consent decree as supplemented.

The *Moore* case necessarily concludes that there is a financial benefit in membership in the union. There is a

reference to the same line of authorities as the *Falcone* case, that for a county medical society to arbitrarily, without reason and without good cause, deny membership to a doctor would interfere with his right to earn his livelihood and to practice his profession.

I would also conclude on the basis of the testimony during this trial that there is a financial advantage to membership in the Local. If nothing else, there is relief from the $2.50 per day travel expense fee.

Mr. Lynes has conceded, and I believe that he would necessarily do so, and he is entirely candid about this, that there is no requirement for a transferee that he be an all around iron worker. The word journeyman does not exclude specialists.

As I heard the testimony of Mr. McCloud, there was no recognized citerion that the applicant for a transfer be an all around iron worker. An applicant might have a specialty such as a rod man. Nor am I able to find in the criteria, P-53 in evidence, that there is any standard or criterion that the applicant be an all around iron worker.

With respect to the ground of denial of application for transfer that there was no formal training or no test, I have to conclude that this is by itself insufficient as a matter of law in view of the factual testimony that these men had experience; Mr. Doninich I believe back to the 1940s and several to the 1950s. There was experience in all cases of at least six or seven years as iron workers prior to their rejection.

It is not a reasonable basis for rejection of experienced iron workers who individually had never been refused for referral to a job or removal from a job because of lack

of qualifications, it is not a reasonable basis for rejecting the transfers of such applicants that they had not taken any formal training or test.

As I have alluded to in the course of interrogation of counsel, I would consider that the refinements of the *Falcone* case as applied to doctors should also hold here, and that before there was a rejection for cause of a transfer on the grounds of lack of qualifications when the man had experience and had developed skills and had performed in the trade, that there should be a specification of what is said to be wrong or lacking in his qualifications. There should be a confrontation with witnesses or a right to confront witnesses, and there should be a right of cross-examination.

These hearings were not hearings in the evidential sense. They were interviews. There was no substantive evidence in these naked interviews themselves to support the conclusions that these men were not qualified by experience and skill to be journeymen iron workers. Many of them were not all around iron workers but they were iron workers with a specialty.

I aiso conclude, and I believe that Mr. Lynes again candidly has virtually conceded this, that the case, nevertheless, must rest or stand or fall on the ground for rejection on the appeal by the International Executive Board. I'm not sure that I have given the right term for the body that rejected it. The general executive board. All right.

As I said in granting the motion of Mr. Stern, there is in the background of this case something of a conflict between the State Court in the *Moore* case and the Federal District Court in the consent decree.

Unquestionably the results or the approach by the Local and the International appears to fly in the face of the *Moore* decision. It would virtually bar any transferees, at least during the course of the four years.

Mr. Duff, a man of vast background as a labor lawyer, testified to his understanding that the objective was to reach a twenty percent ratio of minority members of the Local within a period of five years.

He has testified to his understanding that there was a bar against what is called an inundation of transferees. Nevertheless, there is nothing on the face of the consent decree or of the amendment imposing an eighty-twenty percent ratio or balance.

There has been reliance upon the amendatory language in P-61 in evidence, Paragraph 33B. That language permits transfers, provided that the determination allowing the transfer is made without having the effect of discriminating against or excluding any such applicant on the basis of his race or color.

These present plaintiffs I would have to conclude have been barred because they are White and that they do not have Spanish-speaking surnames.

There seems to be no dispute or question that if these were iron workers with books from other locals who were Black or with Spanish-speaking surnames they would have been admitted, assuming other qualifications, and would not have been barred under the federal consent decree.

So the necessary effect of at least that language is a reverse discriminatory effect contrary to what is now a developing doctrine of law prohibiting reverse discrimination.

The other clause referred to is that there may be a transfer unless the transfer has the effect of perpetrating the effects of any past exclusion.

Now, it is argued, and apparently seriously and I may say ingeniously by counsel for the Local and the International that that phrase is intended to protect the eighty-twenty ratio as to safeguard or assure that the eighty-twenty ratio would be reached at the end of five years.

There is no limitation on the total number of members of the Local. It must have been in the background or within the contemplation of Judge Garth as well as the parties to the consent decree that because of expansion of the economy, for instance, opportunities, there might be an expansion in the total number of members.

It must also have been contemplated that there might be an attrition as a result of deaths, retirements, and so forth.

It appears to me that this eighty-twenty did not have the sanctity of a formula embedded into the consent decree or the amendment. It was an objective which was discussed in the course of negotiations which happened to fit within the numerical proportions at the time of the consent decee, that is, there was the objective of a total of three hundred seventy-five in the course of five years. I believe that's seventy-five per year.

If there are five locals, it is fifteen per local per year members of minorities taken in as apprentices or trainees.

The consent decree has nothing within it except as to admissions of apprentices and trainees. It has nothing specifically in it with relation to transferees, except the language which I have alluded to in the amendment in P-61.

The grounds of rejection are suspect on the basis of uniformity and also as being too pat. Even taking the words at their face value, there is nothing to suggest a harmful discriminatory effect amounting to a perpetuation of past exclusion if the total number of iron workers expands to two thousand instead of fourteen hundred and the number of minority members remains at three hundred seventy-five. At least that is not so clear or so patent that I can find that that language gives sanctity to and embodies within and imbeds within the consent decree as modified the so called eighty-twenty formula.

I believe that the reasons advanced, the conclusions advanced by myself a few minutes ago in dismissing the punitive damage action against the International must also apply to the Local.

With respect to the Local, I conclude that the Local acted arbitrarily, without a reasonable basis, without a substantial basis in denying the applications for transfer on the grounds of lack of qualifications or on the grounds of the federal consent decree.

The defendants did not seek a clarification of the consent decree in the light of the *Moore* case at any time. It may be that at the conclusion of this trial the defendant, Local, and it may even be the International, will seek some clarification of the federal consent decree.

Nevertheless, as I read the federal consent decree, neither on its face nor by any necessary implication nor by any understanding or commitment which is binding upon the parties or upon this Court is there a basis for rejecting transferees who are qualified.

So the order of this Court or the judgment of this Court will be that the plaintiffs are entitled to a judgment to

compel the defendant, Local 373, to admit them to membership.

Now, with respect to the damage claim, the only damage claim that I have heard which seems to have a factual basis would be with respect to a reimbursement for the $2.50 per day travel expense.

I should say that there was some question with respect to Mr. Machemull, as to his present residence, and that the judgment would apply to admission of those now residing in the area, that is, within the geographical jurisdiction of Local 373.

Are you pressing, Mr. Craner, for a compensatory damage judgment with respect to reimbursement of the differential between the $2.50 expense and anything that the Union members may pay or the Local members?

Mr. Craner: May I explain my damage claim? We are seeking compensatory damages based upon the denial of the right to vote and to attend meetings plus the $2.50.

The Court: You have no supporting proof of that, though.

Mr. Craner: There's nothing to prove. It follows, and the Constitution says that you must be a member of the local union in order to do those things.

Now, you can't vote if you are not a member of the local union, your Honor.

The Court: Don't we have an apparent offset of the union dues and any loss because of the expense?

Mr. Craner: No, my clients must pay dues to their local unions just as members of Local 373 pay to their union. My clients in addition pay Local 373 $2.50 for every day that they work. A local man does not have to pay that when he works within the jurisdiction of the district council.

So that my clients, if they work in northern New Jersey, they pay the $2.50. The local men don't pay it. Everybody pays the same working assessment, however.

So that we are out the $2.50, plus if your Honor considers my other damage claim, we have lost the right to vote and to attend meetings, et cetera.

The Court: It would be sheer speculation what the value of that would be. Isn't that so?

Mr. Craner: Your Honor, may I then advance this argument? I'm seeking punitive damages as well. I agree with your Honor that that is hard to fix a dollar amount on. However, at the very least, aside from the $2.50, it is worth at least nominal damages, and I am certainly entitled, if the Court decides to award it, to a punitive damage award based upon nominal damages.

I am also seeking counsel fees in this matter for the reasons that I have outlined in my brief.

If the Court will note that Judge Polow awarded fees based on a trust fund theory.

Mr. Lynes: Judge Polow didn't award counsel fees as far as I know. I think that he directed at the end of the case that Mr. Craner submit an affidavit and he would consider whether or not he could award counsel fees against the International. He awarded no counsel fees against the Local, and there's been no award of counsel fees made whatsoever as far as I know.

Mr. Craner: That's correct, your Honor. I would then ask the same thing, though, but that the award of counsel fees be against the local union.

I have briefed the point, your Honor.

The Court: The only judgment as to damages will be a reimbursement of the $2.50 per day, and that of course would involve an accounting as to what those figures were.

Mr. Craner: That would be from the date of transfer on? Is that correct? It is from the date of application for transfer up to the present time or would it be forever or what?

The Court: I think that it would be limited to the date of rejection by the Local.

Mr. Craner: Very well, your Honor.

The Court: Auugst 13, 1975 in most cases. You may apply for an attorney's fee and you should submit an affidavit of services and it would be on the trust fund theory.

Mr. Lynes: May we submit briefs in opposition to that point?

The Court: Yes, you may.

CERTIFICATE

I, STANLEY GRABON, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript.

STANLEY GRABON, CSR
Official Court Reporter

Judgment

(Filed—January 19, 1977)

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION—MIDDLESEX COUNTY

DOCKET NO. C-2156-75

CIVIL ACTION

PHILIP W. MUNDY, VINCENT H. MACHEMULL, JOSEPH DOLINICH, DONALD MCMAHON, THOMAS MCCLOSKEY, JOHN J. KRUSIS, EDWARD FARLEY, PAUL BONGARD, JR., CHARLES C. BORTON, WILLIAM B. CRAWFORD, PHILIP CONNELL, WILLIAM J. SURMA, LOUIS DICAPUA, HENRY ARMINAS, JOHN MCFADDEN, JOSEPH THOM, JAMES FOX, ARTHUR SMITH, PHILLIP SHADY, FRANK P. CASTELLANO, JR., RONALD BENFIELD, JEFFREY R. COLERIDGE, FRANK O'NEILL, GEORGE MORGAN, LEE ZDUNEK, LEON ADLER, and CHARLES THOM,

Plaintiffs,

vs.

LOCAL UNION NO. 373, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL-CIO and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL-CIO,

Defendants.

Judgment

This matter having come on for trial before the Court sitting without a jury, on November 8 and 9, 1967, John A. Craner, Esq. (Craner, Brennan & Nelson) attorney for plaintiffs, Jerome M. Lynes and John J. Mulvihill, Esqs. (Nolan, Lynes, Bell & Moore) attorneys for defendant, Local 373, and Thomas Parsonnet, Esq. (Parsonnet, Parsonnet & Duggan) and Harold Stern, Esq., attorneys for defendant, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, and the Court having taken testimony in open court and having heard the arguments of counsel, the Court having announced its opinion in open court, and the International having represented in open Court that it would not take action to interfere with the transfer of membership ordered by the Court, and

It is on this 19 day of January, 1977, Ordered that Judgment be entered in favor of plaintiffs and against defendant, Local Union No. 373, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, directing said defendant to immediately take into its membership each and every plaintiff, in accordance with the constitution of the International and to issue the necessary indicia that each plaintiff has so been transferred into defendant, Local 373. With respect to Vincent H. Machemull, transfer is conditioned upon his residing within the territorial jurisdiction of defendant, Local 373.

It is further Ordered that Judgment be entered in favor of each plaintiff directing defendant Local 373 to refund to him all travel service dues paid to Local 373 from the date each plaintiff was rejected for transfer by Local 373 until the date of the actual transfer of each plaintiff.

Judgment

It is further Ordered that Judgment be entered in favor of plaintiffs and against defendant Local 373 awarding to the attorneys for plaintiffs the sum of $500.00 as and for their counsel fees. Counsel for plaintiffs may make further application for counsel fees after the issue of counsel fees in other visinages where similar actions are pending has been resolved and may also offer specific proofs as to the dollar amounts involved for services rendered in this particular case.

It is further Ordered that the motion of plaintiffs to add Edward Kutchman and Walter Clark as party plaintiffs is denied.

It is further Ordered that Judgment be entered in favor of defendant, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO and against plaintiffs dismissing the complaint as to it.

David D. Furman, J.S.C.

Letter Opinion of Dwyer, J.S.C., March 21, 1977

Superior Court of New Jersey

Chambers of
Arthur C. Dwyer
Judge
Chancery Division

Essex County Courts Bldg.
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March 21, 1977

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Re: Esposito, et als
v. Local 11, Ironworkers, et als
Docket No. C-2155-75

Letter Opinion of Dwyer, J.S.C., March 21, 1977

Gentlemen:

In the Complaint filed herein, ten individuals who hold "books" issued by a local union affiliated with defendant International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO ("International") other than defendant Local Union No. 11 ("Local 11") sought in this action to recover compensatory damages for Local 11 wrongfully refusing to transfer their respective memberships from the other locals to Local 11 as well as an order of this court directing said transfer of membership together with counsel fees. At the Pretrial, they also claimed punitive damages.

Thereafter, three other individuals who were similarly situated and who had previously brought such an action (*McFadden, et al* v. *Local 11, et al,* Docket No. C-4230-75) which resulted in a judgment directing reconsideration of the prior applications moved to and were permitted to join this action. They seek relief similar to the original plaintiffs. The prior decision was the result of the decision of the New Jersey Supreme Court in *Moore* v. *Local 483,* 66 N.J. 527 (1975) and *Philipchuk, et al* v. *International Association, AFL-CIO,* 66 N.J. 539 (1975). The judgment permitted "* * * questions as to qualifications but not to include tests * * *".

Plaintiffs herein means all thirteen individuals.

The Answer of the International admitted that the ten original plaintiffs were members in good standing in the International and the locals other than Local 11. In other respects it asserted the autonomy of Local 11 to make decisions concerning transfers, it lacked knowledge concerning activities of Local 11, Complaint made no allegations of misconduct on its part, and any plaintiff who

Letter Opinion of Dwyer, J.S.C., March 21, 1977

had not appealed Local 11's decision had failed to exhaust internal remedies.

The Answer of Local 11 denied that the ten original plaintiffs or the three added plaintiffs were members in good standing of the International or the other local. It admitted the rejection of the transfers. It asserted any Plaintiff who did not take an appeal failed to exhaust internal remedies. It asserted a separate defense that the court lacked jurisdiction because the United States District Court had entered a Consent Decree in *United States of America* v. *Plumbers Local 24, et al.,* on July 28, 1976 as amended and supplemented which controlled all hiring practices and therefore preempted the matter. It asserted that Local 11 properly exercised its discretion under the International Constitution and was sustained by the International. It asserted that Plaintiffs obtained their memberships in other locals by fraud and hence are barred from seeking equitable relief.

Both International and Local 11 deny Plaintiffs have any right to counsel fees.

A review of such recent cases as *Ferger* v. *Local 483,* 94 N.J. Super. 554 (Ch. 1967) aff'd 97 N.J. Super. 505 (App. Div. 1967) and *Moore* v. *Local 483, supra,* as well as the related cases in the United States District Court for New Jersey and the Court of Appeals for the Third Circuit, show that there is a history of conflicting interests among those engaged in the work done by the Ironworkers and those involved in the union movement active in that jurisdiction which undoubtedly has become more aggravated by several recent Federal laws and particularly those laws found in Title VII of the Civil Rights Act of 1964, 42 USCA 2000e, et seq., coupled with the decline in construction and resultant loss of construction work,

the issues in the minds of many have to be "bread and butter" if not survival issues. This is also evident from the testimony. It is not the function of this court to harmonize and resolve all those problems.

It is the function of this court to decide the issues posed by the parties in this action. The ten original plaintiffs have withdrawn as much of their claim for compensatory damages as relates to wage loss based on discriminatory hiring practice because of a pending hearing before the NLRB. Tenore one of the three added plaintiffs has similarly withdrawn his claim for compensatory damages. The court earlier ruled on offers of proof that Plaintiffs would show from records of the pension fund associated with Local 11 that members of Local 11 with allegedly similar experience had earned more than Plaintiffs that the court was preempted from going into that area based on the cases set forth in the record. The court further ruled that payment of travel dues of $2.50 for each week or part thereof worked by a Plaintiff remained in the case. See concurring opinion of Justice Fuld in *Phalen* v. *Theatrical Protective U. No. 1,* 22 N.Y. 2d 34, 290 N.Y.S. 2d 881 (1968) cert. den. 393 U.S. 1000 and *NLRB* v. *Allis Chalmers Mfg. Co.,* 388 U.S. 175, 184, 186, 87 S.Ct. 2001, 18 L.Ed. 2d 1123, *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018.

The separate defense based on total preemption because of the Consent Decree was not seriously pressed. Indeed, it could not be. The decree as amended by order of September 1973 expressly permits transfers.

> 33 (B) "During the effective period of this Decree, to the extent that the defendant locals accept into membership individuals holding journeyman membership in non-defendant locals of the International they shall accept or deny the membership applications of such individuals according to the rules and regulations of the defendant locals and the International governing such transfers, provided that such determinations shall be made without having the effect of discriminating against or excluding any such applicant on the basis of his race or color, or of perpetuating the effects of any such past exclusion, and provided further, that all such transferees must meet the minimum qualifications under Paragraph 33(A) herein."

The relevant portion of Paragraph 33 (A) setting forth the minimum standard is:

> "Each defendant local shall offer full journeyman membership to any black or Spanish surnamed American, who either:
>
> (1) has six months experience in the ironworking trade (including but not limited to shop work and construction laborer work); or * * *".

This is the minimum standard.

The courts of the various states have jurisdiction to protect the rights of members of unions afforded them under the constitution or charters of the union organization. *International Association of Machinists* v. *Gonzales, supra,* see authorities in f.n. 7 in *Ferger* v. *Local 483, supra,* at p. 569.

The following facts are undisputed. Each of the Plaintiffs obtained a membership book in a local other than

Local 11. Each of the Plaintiffs is a resident of the northern New Jersey area and was at the time he obtained a membership book in the other local. Each has paid dues to the other local regularly. Each has obtained a clearance card from the other local for transfer to Local 11. Each has filed the clearance card with Local 11. Each has applied for transfer to Local 11 and been rejected. Local 11 has sent to each of the Plaintiffs a letter setting forth the reasons for rejection.

In respect of the three added Plaintiffs the Executive Committee of Local 11 conducted an interview on April 10, 1975. The letters of rejection sent by Local 11 were substantially identical. The reasons stated for rejecting the transfer were:

1. In applying for membership the individual had misstated his work experience. The local did not give a test. He had not completed an apprenticeship program. Local 11 referred to Sec. 6 of Art. II of the International Constitution which provides that

   "Any membership gained by false pretenses or misrepresentation shall be revoked."

2. Local 11 could not make any determination as to transferee's qualifications to be a journeyman ironworker because transferees refused to answer questions about same.

3. The last reason was that under the consent decree

   "* * * requiring us to admit to membership a group of minority workers equal to 20% of our total membership. We must be very careful in

   this respect to comply with the Order and we do not want to increase the number of minority workers by an unreasonable number especially at a time when we are now applying for relief from that Order."

Likewise the letters to the other ten Plaintiffs were identical to each other except for the names. A copy of one of said letters is attached as Appendix A, rather than copy it.

In essence the Executive Board found these transferees "had no formal training in the various phases of ironworking" and had never been tested. It further found that these transferees had not acquired the necessary training and experience to qualify as "an all around journeyman ironworker."

The Executive Board referred to the consent decree that required it to have 20% minority journeymen and apprentices by 1977 and concluded:

> "Counsel has, therefore, advised the Executive Board that the acceptance of white transfers at this time would place Local 11 in jeopardy of violating its commitments and obligations to the Government."

The International sent identical letters to all the Plaintiffs. This appears to be consistent with the practice of the General Executive Board in issuing guidepost decisions where facts are similar. Mr. Lyons on deposition testified that an investigation had been made; that he met with the Business Agents for the locals of the District Council for Northern New Jersey, and explored the consent decree.

He further explained that the International had a special department that monitored consent decrees and kept copies of all such documents at Headquarters.

In respect to Northern New Jersey he said:

> "* * * the consent decree stipulated specific percentages of ironworkers and if you are going to have specific percentages or ironworkers each year growing, you are going to have to have an employment capability of having ironworkers employed. The employment situation in Northern New Jersey we have been working with and are aware of for some period of time. * * *"
>
> "* * * the conclusion I should say that the employment opportunities for ironworkers in Northern New Jersey is very, very bleak * * *" See pp. 22-23.

At p. 29-30 Mr. Lyons said that he was aware as were the other members of the General Executive Board the Consent Decree contained no specific percentages. The Board had a copy of it. He further stated the knowledge about percentages was based on what the Business Agents told them,

> "* * * what they had agreed to that would ultimately be put in the final version and we concluded that they were telling us the truth based upon the fact that what they were saying to us is the same thing that we have seen time and time again in consent decrees across the country, these three elements: A number, a time and the end result." * * *
>
> "Now, on the point of the end result the Government was asking for a percentage of the numbers, this is what the Local told us. * * *" (p. 31)

The reason for the percentage at the end of the decree was that minorities then would have a political voice in the Local Union. (See p. 32)

The letters from the International were all identical except for dates and names. The General Executive Board stated it would only comment on the Civil Rights reason. It stated:

> "With respect to the Civil Rights reason, the General Executive Board noted that every local union affiliated with this International Association has rights of local autonomy and in accordance with this principle has the discretionary right to protect the interests of its members, provided the use of such discretion is not capricious. In this connection there is presently outstanding a United States Court decree which requires and directs five local unions affiliated with this International Association—all located in northern New Jersey, including Local Union No. 11—to admit into membership black journeymen on a quota basis and sets a goal to be reached by 1977. This decree was issued by the United States District Court on the basis of a formula that established an end result which included both the number of admissions of black journeymen and a percentage of black to white membership. If Local Union No. 11 were to transfer you and others who have applied at this time, the addition of such transfers could cause an imbalance which might prevent the local union from achieving its commitment to the Federal Court because of circumstances over which it has no control.
>
> "The General Executive Board recognizes, of course, that there are no limitations on the number

of individuals who may be admitted to Local Union No. 11. However, as you must be aware, a serious unemployment problem exists in the construction industry at the present time and in the foreseeable future in northern New Jersey which seriously affects the employment of iron workers."

Harold Stern, Esq., General Counsel for the International stipulated that if the court ruled adversely on the Civil Rights defense, the International would not then decide on the other grounds. Local 11's time for appeal within the Constitution of the International has expired.

For completeness the issues for decision are:

1. Is Local 11's expressed desire not to disturb the projected number of minority members in relation to the 1972 membership of 5 affiliated locals a reasonable basis for rejecting the transfers?

2. If it is not, are the other reasons advanced reasonable grounds for rejecting the transfers within the guidelines of *Moore* v. *Local 483, supra*?

3. If 1 and 2 are answered negatively, is Local 11's and the International's action based on reasons so invalid that such action must be regarded as arbitrary or capricious?

Before taking up the issues in the order stated, the court notes that the attorney for all the locals prepared a set criteria to be used for judging requests for transfers. Local 11 adopted it in March 1975. It was never distributed. The explanation was that no one had asked for it. The attorneys, during the litigation didn't even seek it by interrogatory. It was produced during the evidence presented by

Local 11. The reasons set forth for rejection bear some relation to said criteria.

1.

The Consent Degree was agreed to by all parties, which included Local 11 and the other locals in the Northern New Jersey District Council, in February 1972 except as to membership requirements. Footnote 5 to Judge Garth's decision dated December 22, 1972. The issue of membership in the locals for the ironworkers was litigated.

Judge Garth set forth in finding 13 that from 1963 to 1972 there were three methods of gaining admission to the locals, including Local 11:

(i) successful completion of the apprenticeship program;

(ii) with respect to defendant Locals 11 and 483, sons and other relatives of incumbent members, all white, have been admitted directly to journeyman membership in the defendant locals without the necessity of having served in the Ironworker JAC program. * * *

(iii) with respect to defendant Locals 45, 373 and 483, sons and other relatives of incumbent members, all white, have been transferred into journeyman membership in the defendant ironworker locals after having obtained ironworker journeyman membership in ironworker locals located outside the Northern New Jersey area.

Judge Garth then decreed the following as the language for paragraphs 33.(A) and (B):

"33.(A) Each defendant local shall offer full journeyman membership to any applicant who either:

(1) has six months experience in the ironworking trade (including but not limited to shop work and construction laborer work); or

(2) has successfully completed an 'approved' examination or test.

(a) An 'approved' examination or test is any valid, written examination or test capable of objective evaluation or grading, which test reasonably measures and is demonstrably related to the individual's ability to perform the normal day-to-day work required of an average journeyman ironworker.

(b) The validity of any such test shall be determined according to *Guidelines on Employee Selection Procedures,* 29 C.F.R. §§1607 *et seq.* (1972), and the use of such test shall be approved in writing by the plaintiff prior to its use by the defendants.

"33.(B) All applicants for full journeyman membership, including applicants who have already attained journeyman membership in a local not a party to this action or in the International, must satisfy the requirements as set forth in paragraph 33.(A) above."

The local unions, including Local 11, then appealed Judge Garth's decision. There is testimony that the reason for the appeal was that the language in Paragraph 33.(A)(1) would destroy the apprenticeship program. But see Paragraph 38(e) of the Consent Decree.

An affidavit of Wallace, Business Agent for Local 11, filed in support of a stay pending appeal stated in part:

"c. There are presently pending 19 requests from White members of other locals in the International for transfer into the defendant Locals, pursuant to the Order; notwithstanding the fact that these individuals are not minority group members nor have they been discriminated against in employment referral. Deponent respectfully submits that unless a stay is entered, the defendant Locals will be inundated with transfers from White members of other locals. At present, there are approximately 1900 members of other locals working within the territorial jurisdiction of the defendant Locals. Without a stay, such men would be eligible for transfer regardless of their color or other Union affiliation pursuant to the Order subject to the appeal herein."

In July 1973 the Government and the other parties entered into a further stipulation that set forth Paragraph 33A and 33B set forth above. It also changed Paragraph 38(e) to read as follows:

"Any apprentice or trainee who resigns or whose apprenticeship or trainee program is terminated for any reason except by reason of illness, injury, or military service shall forfeit all referral rights for a period of one year, and no work experience obtained as an apprentice or trainee shall be applied to work experience necessary for union membership pursuant to paragraph (33) (A) (1) herein. Such persons shall, however, have the right to reenroll in any subsequent year in the apprenticeship or trainee programs without forfeiture of any completed year of training."

The language quoted immediately above made it clear that no apprentice dropout would gain membership under Par. 33(A)(1).

The language in Par. 33(B) sets up four criteria:

"1. transfers shall be accepted on the basis of the rules and regulations of the International and local Constitutions governing transfers;

2. such transfers shall be determined without the * * * 'effect of discriminating against or excluding any such applicant on the basis of his race or color * * *'

3. such transfers shall not assist in '* * * perpetuating the effects of any such past exclusion * * *'; and

4. all such transferees must meet the minimum qualification under Par. 33(A) herein."

The basis for any discussion of a percentage factor is found in Par. 38(c) which states:

> "The JAC shall select and indenture each year no fewer than 75 minority applicants that qualify, if available, in the Ironworker Employer Training Program and in the Apprenticeship Training Program under the selection procedures listed above for a period of no less than five (5) years. *The good faith goal shall be to indenture an equal number of applicants in each program, but in any event to indenture no less than 25 minorities in the apprenticeship program.*" (Emphasis added).

This language is part of the original bargained for portion of the Consent Decree. Plaintiffs urged that under the parol evidence rule no testimony should be allowed about

negotiations between the Government attorneys and attorneys for the local to show that a 20% membership goal was to be attained at the end of 1977 so that minorities would have a political voice in the locals.

Local 11 urged that there was some ambiguity. The court allowed the testimony. Those who testified for Local 11 were Wallace, the Business Agent, attorneys Kennedy, a specialist in Title VII matters, and Duff the regular attorney for Local 11.

The thrust of their testimony was that 375 was based on adding that number to the number 1400 which was the membership for all five locals which then made 375 20% of the projected 1977 membership. Arithmetically the calculation is wrong for 375 is 20% of 1875.

However, there are more substantial problems with the testimony. The numbers relate to applicants not journeymen at the end of a three year program. The Consent Decree itself recognizes that there will be attrition. In fact the testimony establishes the greatest attrition is with minorities.

Careful review of Kennedy's testimony shows that the Government never talked in terms of a "quota" but good faith goals. The only definite number mentioned after "good faith goal" is 25 per year for five years or a total of apprentices of 125. If this were attained the impact politically on the locals would be far less than 20%.

The court accepts the Plaintiffs contention that the proper standard for construing a consent decree in respect to purpose is set forth in *United States of America* v. *Armour & Co.*, 402 U.S. 673, 29 L.Ed. 2d 256, 91 S.Ct. 1752 (1971)

> "• • • the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of the parties to it • • •" [402 U.S. 681].

The cases collected in the footnotes to Justice Pashman's dissent in *Lige* v. *Town of Montclair*, 72 N.J. 5 (1976) at p. 27 *et seq.* demonstrate that the United States of America knows how to spell out a quota program when it desires one.

Significantly no witness from the Department of Justice or EEOC was called. No brief *amicus curiae* was requested.

The court concludes on the testimony of the witnesses of the defendants that no quota system was ever agreed to. The court concludes that construing the Consent Decree within its four corners none can be spelled out.

The training commitment is that of JAC an independent legal entity from the locals.

The court will consider the fourth criteria in the Consent Decree in reverse order.

The undisputed evidence is that each of the Plaintiffs has worked for five years or more in one or more of the eight branches of ironworking referred to in Paragraph 6 of the Consent Decree. Each of said Plaintiffs has been referred out for work by the hiring hall of Local 11. Each of the July 22, 1975 letters of rejection in essence implies the rejected transferee will be continued to be referred out on a non discriminatory basis.

This is sufficient to satisfy the fourth criteria and the court so finds.

The effects of such past exclusion were threefold. They excluded minorities. They gave preferences to sons and relatives of members of certain locals. Local 11 is not picked out as one of such locals by Judge Garth. Except possibly in the case of Surrinski, the court does not recall that any of the Plaintiffs are sons or relatives of members of Local 11. In the case of Surrinski, the court recalls that his father assisted him in getting a book in the Scranton local and worked with him. If his father is a member of Local 11 or any of the others are sons or relatives, then that matter should be separately explored with EEOC which is now in charge of enforcement. The admission of these Plaintiffs will neither further discrimination nor reduce job opportunities for they are already in the active job market with other members of Local 11.

The July 22, 1975 letters state:

> "Counsel has, therefore, advised the Executive Board that the acceptance of white transfers at this time would place Local 11 in jeopardy of violating its commitments and obligations to the Government."

That reason violates the second criteria of the Consent Decree. It also amounts to the reverse discrimination referred to in *Lige* v. *Town of Montclair, supra.* See discussion at p. 19.

The court in this action is not dealing with a class of 1900 members referred to in the Wallace affidavit. It is dealing with thirteen identifiable persons and Local 11 and the International.

This leaves the first criteria of the Consent Decree. This in essence is the same standard as mandated by

Moore v. *Local 483, supra.* Except for the 1968 amendment to the International's Constitution which change the criteria from automatic transfer, *Ferger* v. *Local 483,* 94 N.J. Super. 554 (Ch. 1967) aff'd 97 N.J. Super. (App. Div. 1967). Accordingly, the court will consider this under point 2.

The court concludes that the reasons given by Local 11 and the International based upon the consent decree are not well founded.

If the Consent Decree is construed as contended by defendants the effect is to exclude all whites over age 30 from admission and reduce the means for admission for whites to an apprenticeship program. The New Jersey Supreme Court has already ruled that the type of admission for individuals such as Plaintiffs must be by means other than apprenticeship. *Moore* v. *Local 527, supra.*

> "The transfer of such journeymen members should not be barred because of a decision to restrict membership to those who have participated in an apprenticeship program." (66 N.J. at 537).

2.

In *Ferger* v. *Local 483, supra,* the court did not have to construe and apply the provisions of Article XXI, Sec. 30 and 31 of the International Constitution as amended in 1964 which required that transfers be approved by a majority vote of the membership of the local into which an individual sought to transfer membership. It noted that the Executive Committee had the power to inquire into "the character and qualification" of the individual seeking transfer.

> "While the International constitution has been amended to grant the above-mentioned discretionary right to local unions in accepting transfers, nothing was done to the constitution by way of supplement or amendment so as to effect a change in the requirements or qualifications for membership in the International Union. Those requirements, as set forth in article II, sections 1 through 6, have remained unchanged. There is nothing in the record of the federal proceedings, or in the proceedings in this action, which even remotely indicates that there is some change in the status of any plaintiff with respect to his membership in the International Union. I cannot accept any suggestion that the discretion given to local unions under the constitutional provisions quoted above is one of unbridled nature. It is not difficult to conceive of situations in which the exercise of the 'discretion' granted to local unions might become arbitrary or unreasonable. Obvious examples would be the refusal to accept a member by transfer solely because of race, creed or ethnic origin. * * *" (94 N.J. Super. at 573).

Earlier the court had noted that after the Federal litigation referred to, the local had urged in the Ferger case the transferors had obtained membership by fraud and without complying with professional standards. But it ruled that the prior Federal litigation disposed of those defenses.

In 1968 the International Convention changed Sections 30 and 31 to read:

> "Sec. 30. A member of the International Association who desires a clearance card for the pur-

pose of transferring his membership to another local union must be a member of the International Association for at least two (2) years. Any member who has been a member of the International Association for at least two (2) years, desiring a clearance card for the purpose of transferring his membership to another Local Union shall apply to the Financial Secretary of his Local Union, and if such member is in good standing in his Local Union, and no charges are pending against him, the Financial Secretary shall grant a clearance card upon the payment by the member of unpaid dues, or other obligations, plus One Dollar ($1.00) for the clearance card. The Financial Secretary of the said Local Union, upon issuing said clearance card, shall report the same to the next meeting of the Local Union, and report same on a regular monthly report submitted to International Headquarters.

"Sec. 31. Thereafter a member obtaining a clearance card must present the same to the Local Union into which he desires to transfer, for acceptance by it, and the matter shall be referred to the Executive Committee of the local union which shall accept or reject such clearance card within the discretion of the Executive Committee. The decision the Executive Committee of either acceptance or rejection of the clearance card shall be subject to review by the General Executive Board.

As stated earlier, there is no dispute that each of the Plaintiffs procedurally complied with all steps required under 30 and 31 of Article XXI.

In *Moore* v. *Local 483, supra,* the New Jersey Supreme Court recognized that the Executive Committee should consider a prospective transferor's "qualifications" and that the local in the first instance should establish criteria by which transfers would be judged. 66 N.J. at 537.

Local 11 did adopt criteria, Ex. DL-10, in March 1975 to judge transfers. Local 11 introduced them. The contention is that the transfers were judged by these criteria.

The court has the benefit of a transcript of the interviews held for the original ten Plaintiffs. The testimony establishes the interviews for the added three were substantially similar.

The criteria are:

"1. Criteria relating to origin of applicant's contract right of transfer."

Under this heading four questions are taken from the membership application which are:

No. 6 How long have you been following the trade?

No. 7 Are you able to command the average wage *in this locality?*

No. 8 Are you in sound health?

No. 9 Are you willing to take an obligation that will in no wise conflict with your religious beliefs on your duty as a citizen?

2. Criteria respecting qualifications?

3. Criteria relating to required residency?

4. Criteria relating to health?

5. Criteria relating to union obligation?

Letter Opinion of Dwyer, J.S.C., March 21, 1977

In Query No. 6 criteria it is stated that long period of training is desirable and the requisite period of the apprenticeship is about what time it takes to acquire skills of "Journeyman Ironworker", as distinguished from specialized branches. The latter are recognized in the referral system spelled out in the Consent Decree. On page 5 it then states 5 to 15 years experience is the time needed to acquire the skills without an apprenticeship.

In *Moore* v. *Local 483, supra,* apprenticeship was ruled out for the type of transferor involved here.

By reason of the bargaining over the very issue of transfer membership in Par. 33(a) of the Consent Decree, Local 11 agreed six months was reasonable for membership. Although there is a two year period before transfer is possible Art. XXI §30, if six months experience is adequate for direct membership as a construction laborer how can five years as an ironworker be inadequate?

The evidence shows that each of the Plaintiffs has five years and some more than 15 years.

In Query No. 7, the criteria suggest the reference is competence to perform work adequate to receive the wage rates in the area of the District Council and that residence should be in that area.

The Criteria on page 7 refers to the fact that the application blank requires a certification that the answers are true, particularly those as to qualification, and that if false the individual may be debarred.

The findings of Judge Garth as to what Local 11 did in its own admissions prior to 1972 raise substantial questions as to whether or not at the time Plaintiffs filled out their applications that under prevailing practices there was any deception.

Letter Opinion of Dwyer, J.S.C., March 21, 1977

But more to the point, each of the Plaintiffs has demonstrated qualification for over five years. The question is *transfer* not original application.

Aside from the fact that the International suggested their reasons could only be inquired into at a hearing where presumably the officers of the other locals would be available and the scope of everyone's knowledge explored, there are substantial factors of waiver and estoppel.

The Criteria is replete with random references to elements of contract law such as fraud. However, no where is reference made to materiality, laches, waiver, acquiescence, or estoppel if not ratification. There is reference to the "all around ironworker", the specialist ironworker, and the shopman which is deemed irrelevant.

It is not necessary for this court to comment on the statements that in bargaining the business agents represent only "all around ironworkers". There is no testimony by defendants that any exist except by sugggestion that the apprenticeship graduates may. It is not a term found in the International Constitution. The suggestion that transferors must be "all around ironworkers" is unrelated to the facts in the record or the referral for work testified to.

The tests suggested have none of the safeguards of objectivity suggested by Judge Garth and were not administered as a matter of fact.

In respect to residency the evidence establishes most if not all of the Plaintiffs own their homes in the District Council area at the time of requesting transfer.

In respect to health there is no showing any applicant was not in good health or incapable of work. If health is a question, a medical examination would be appropriate. See comment below on Durante.

In respect to taking an oath, the nature, form and content of the oath are not set forth except as to the application blank. If one is desired as many organizations do it can be taken when the transferors are sworn in. There is no showing or suggestion that any Plaintiff has been disloyal to the union movement generally, the International, the Local to which he belongs, or Local 11.

Good moral character is a relevant factor. There is no showing that any Plaintiff lacks good moral character.

The court will now consider the specific reasons set forth in the letters dated July 22, 1975.

The Constitution of the International sets forth the requirements for membership:

ARTICLE II.

Membership

"Sec. 1. This organization shall consist of an unlimited number of bridge, structural, ornamental, reinforced concrete iron workers', machinery movers', stone derrickmen's, shopmen's and navy yard riggers' local unions, and the various members thereof, and it shall not dissolve so long as any two local unions oppose such dissolution.

"Membership Requirements

"Sec. 2. To be admitted to membership in any local union of the International Association one

must be a practical workman versed in the duties of some branch of the trade as set forth in Section 1 of this Article, of good moral character and competent to demand standard wages."

Sec. 3-6 are prohibitions against persons who belong to organizations that in substance would subvert the United States of America and/or the union movement, the International or any local thereof.

Each local is given authority to adopt its own by-laws (Art. XXI §4) provided the same do not conflict with Article XXVI "Constitution Governing all Local Unions." There is no provision therein dealing with membership.

Article IV sets forth the claimed jurisdiction. A local might very well specify an area or degree of competence for membership. Local 11 has introduced no evidence that it has any such requirement.

Except to the statements in the Criteria about "an all around ironworker", there is no evidence to support a finding that said criteria was ever employed in practice. By reason of Local 11 agreeing to the referral system in the operation of its hiring hall by branches in the Consent Decree and by reason of the fact that the hall has been so run for at least four years and one of said years regarded as excellent for construction work and ironworkers, the court finds that this reason is not only not supported by the evidence, but is contradicted by the evidence including the evidence produced by Local 11. Presumably the all around ironworker could do every task for each branch of work on the referral questionnaire.

The reference in the letters to "no formal training" if construed to mean apprenticeship the Supreme Court has already ruled invalid.

The letters also indicated no evaluation of the facts. DeMaio testified that after he had his book "• • • I went to Local 11's apprenticeship school. • • • When I first came into the business I went through welding and I learned everything else with Hank. • • • We went two terms with them. • • • I would say '68, '69. • • •"

In response to the question

> "• • • what kind of work have you done?"
> "A. A little bit of everything.
> Q. Can you make it more clear?
> A. I have done finishing, I have done roads, I have done a little rigging, I did a little bit of—I did some sheeting. I did miscellaneous iron." (See p. 31 DL-11).

He received the same form letter as everyone else.

The court will not comment on each interview. In general, DL-11 shows that the ten had varying experience, had been referred out by Local 11, were never fired for incompetence but one was fired for being 20 minutes late from lunch when he encountered a problem in cashing a check, apparently cooperated with Local 11, felt Local 11 members were favored in job assignments, and wanted to participate in Local 11 in selecting those who represented them.

In respect to the additional three, the reasons set forth in their letters are that their memberships were obtained by fraud and hence the Local did not want members who could be expelled, that they had refused to answer questions about qualifications, and Local 11 did not want to violate the Consent Decree.

Each of these refused to answer certain questions on the advice of counsel that no tests were to be administered.

The persons conducting the interviews included one who gave out work assignments. DL-11 p. 97.

No witness for Local 11 testified as to what competence was needed. From the testimony of Wallace the court concluded that the applicable collective bargaining set the wage scale for ironworkers, with a differential for apprentices and trainees but that otherwise as to the branches specified in the referral form there was no difference. The court finds that there was and is no separate category of "general all around ironworker".

The court finds it significant that in the July 22, 1975 letters that Local 11 did not find the difficulty with obtaining membership worthy of mentioning as a ground for refusing transfer even though it stated it had inquired into it.

Based on the record in this action, the court finds that any problem surrounding the original application for membership not a valid reason for denying transfer.

3.

Defendant correctly states that an action at law in lieu of *mandamus* may be brought to enforce rights of membership. *Zeliff* v. *Knights of Pythias*, 53 N.J.L. 536 (S.Ct. 1891). But they are wrong in asserting that the presence of a "discretionary power" in Local 11 ends all right of Plaintiffs to any judicial review where that discretionary power has been exercised.

The question here is whether there was good faith exercise of that power or was it arbitrary and/or capricious.

Then Vice Chancellor Jayne stated the test for judicial review of action by a labor union in expelling a member in *Dragwa* v. *Federal Labor Union No. 23070,* 136 N.J. Eq. 172 (Ch. 1945) as:

> "• • • It is to be realized that Chancery does not furnish a retrial of the case to determine anew the guilt or innocence of the union member (citations omitted—ed.). The inquiry when undertaken by this court is usually concentrated on the good or bad faith inspiring the action of the union and on whether the expulsion of the member and the underlying causes are capricious or contrary to public policy and natural justice." (136 N.J. Eq. at 174).

The standard for review of denial of a surgeon to surgical privileges at a hospital was set forth recently by the New Jersey Supreme Court in *Guerrero* v. *Burlington County Mem. Hosp.,* 70 N.J. 344 (1976) as follows:

> "• • • a reviewing court should confine its effort to determining whether the decision made by the hospital is supported by substantial credible evidence and is neither arbitrary nor capricious. When a decision fulfills these requirements, a reviewing court should refrain from substituting its own judgment for that of the hospital authorities.
>
> "It is well settled that this is the proper standard of review by which to measure the propriety of determinations of administrative agencies. *See, e.g., Close* v. *Kordulak Brothers,* 44 N.J. 589-99 (1965); *Flanagan* v. *Department of Civil Service,* 29 N.J. 1, 12 (1959); *First Savings & Loan Association* v. *Howell,* 87 N.J. Super. 318, 321-22 (App. Div. 1965), certif. den. 49 N.J. 368 (1967); *Quinlan* v. *Board of Education,* 73 N.J. Super. 40, 46-47 (App. Div. 1962); *Tullo* v. *Township of Millburn,* 54 N.J. Super. 483, 498 (App. Div. 1959). We consider the same standard of review appropriate with respect to decisions of governing boards of hospitals, such as the determination here being examined. See *Duffield* v. *Memorial Hospital Association of Charleston,* 361 F.Supp. 398, 404 (S.D.W.Va. 1973); *Davidson* v. *Youngstown Hospital Association,* 19 Ohio App. 2d 246, 250 N.E. 2d 892, 896 (1969); *Benell* v. *City of Virginia,* 258 Minn. 559, 104 N.W. 2d 633, 636 (1960); *Grodjesk* v. *Jersey City Medical Center,* 135 N.J. Super. 393, 410 (Ch.Div. 1975). Such a standard defers to the expertise of hospital authorities concerning the operations of the hospital, while at the same time affording full opportunity for *judicial intervention when there is no rational basis for the decision being reviewed, or it appears to be unreasonable, arbitrary or capricious.*" (70 N.J. at 356, emphasis added).

In respect to the problem of new doctors coming into the area the New Jersey Supreme Court in *Guerrero* said:

> "Nothing we have said should be in any way construed as suggesting that hospitals may routinely deny staff privileges to doctors moving into an area. Any denial of such privileges, if motivated by a desire to exclude newcomers in order to maintain the status quo of the staff, would not be judicially tolerated. Implicit in our opinion in *Falcone* v. *Middlesex County Medical Society,* 34 N.J. 582, 597 (1961) is the belief that the power to exclude must be reasonably and lawfully exercised in furtherance of the

> interests of both the public and the medical profession. A denial predicated upon exclusionary policies fostering only the well-being of those staff members who are already admitted would clearly be in derogation of the spirit of *Falcone.* * * *" [70 N.J. at 358].

In *Greisman* v. *Newcomb Hospital,* 40 N.J. 389 (1963) the New Jersey Supreme Court characterized the "discretionary power" to admit new staff as a fiduciary power.

After referring to the trial court decision in *Falcone* v. *Middlesex County Medical Society, supra,* the court said:

> "On appeal, its judgment was sustained in an opinion which, after pointing out that the Society had virtually monopolistic power to preclude Dr. Falcone from successfully continuing his practice and to restrict his patients in their freedom of choice of physicians, held that public policy dictated that this power was not to remain unbridled but was to 'be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally.' 34 N.J., at p. 597. Supporting reference was made to various decisions including *Wilson* v. *Newspaper, etc., Union,* 123 N.J. Eq. 347, 351 (Ch. 1938), where Vice Chancellor Bigelow had appropriately suggested that where a labor union has a virtual monopoly it is under a fiduciary duty not to exercise its membership power in arbitrary fashion. * * *" [40 N.J. at 400].

In *Wilson,* the union had signed a closed shop agreement with the Newark News, denied plaintiff admission, and then

sought his discharge on the ground that he was not a member of the union. Plaintiff did not seek admission to the union but an injunction against union interfering with his job which was granted.

Art. I, par. 2, of the 1947 New Jersey Constitution provides:

> "Persons in private employment shall have the right to organize and bargain collectively * * *"

The Landrum-Griffin Act, 29 U.S.C. §401 encourages the view that individuals who are affected by the collective bargaining agreements negotiated by a union should have rights of election in those unions.

These are the goals sought by the Plaintiffs. They are consistent with the public policy of this State.

Against this criteria of exercise of fiduciary power, based on credible evidence to show a rational and reasonable reason for rejection of the transfers, this court concludes that the record establishes beyond a fair preponderance of the credible evidence that defendant Local 11 Executive Committee did not base its decision on credible evidence or rational reason.

In respect to the Consent Degree reason, the court at most can find that it is a mitigating factor in respect to punitive damages in that there may have been some subjective feeling that admissions of white transfers in light of the little progress in attaining minority trainees and/or apprentices might have created problems.

The court repeats the finding that there is no basis of credible evidence based on defendant Local 11's testimony that any quota existed.

The court also finds in respect to punitive damages that defendant Local 11 harbored no ill will or malice towards the Plaintiffs but were seeking to protect jobs for the members who elected them.

The court has already commented on the other reasons given under the criteria.

The court finds that the reasons based on the original application are not rationally related to the transfer where there is no showing of disloyalty to the International, their original Local, or Local 11, for periods ranging from 5 to 15 years. If it is appropriate to take an oath, Local 11 certainly should give one to all persons who come in.

The court repeats as an express finding that there is no requirement existing for "general all around ironworker", either in the International Constitution, Local 11 By-Laws, or the practices of the referral system at the hiring hall run by Local 11.

Local 11 is required by the Consent Decree to keep records of referral and file reports. The records of Local 11 presumably show who worked, when they worked, and what they did. They would also show who did not answer a call for work.

It may well be that a reasonable provision in a Local By-Law for continued good standing is a requirement that unless ill or otherwise excused, a failure to register for work or respond to a call on a certain number of occasions within a time span is ground for expulsion. But in the absence of Local 11 showing that any of the Plaintiffs posed that problem it is not a reason for denying transfer.

Local 11 did not ground the refusal to honor Durante's transfer on a health problem. The problem is not job

related, it is a pinched nerve. It has caused him to have to leave work. Durante should submit a statement of his treating physician that he is capable of working without difficulty. If Local 11 questions it, it may request a physical examination and report by their own independent physician.

The court concludes that Plaintiffs have met their burden of proof. The court concludes that Local 11 did not base its rejection on an exercise of reasonable fiduciary discretion. The court concludes that the rejections were on grounds that were not relevant and may be illegal.

Under the circumstances of this case the court directs that International and Local 11 enroll the Plaintiffs subject to the provisions of Article XXI of the International Constitution in Local 11, subject in the case of Durante to proof of medical qualification.

In respect to damages, the court concludes punitive damages should not be awarded.

In respect to the $2.50 per week charge, the court directs an accounting from the date of the affirmance of the denial of the transfer by Local 11 by the International.

Since counsel for Plaintiffs stated on the record that there was no contention of joint action by International and Local 11, the court will not find that they did act jointly; hence, damages will be and hereby are determined to be payable only by Local 11. Costs are awarded to the Plaintiffs.

For purposes of attorneys fees each of the Plaintiffs was seeking his own relief. The court therefore determines that allowance of fees is not authorized under Rule 4:42-9.

Counsel for Plaintiffs shall submit an Order.

Very truly yours,

ARTHUR C. DWYER
J.S.C.

Judgment

(Filed—April 26, 1977)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—ESSEX COUNTY
DOCKET NO. C-2155-75
CIVIL ACTION

ALFONSO A. ESPOSITO, *et als*,

Plaintiffs,

vs.

LOCAL 11, IRONWORKERS INTERNATIONAL ASSOCIATION, *et al*,

Defendants.

This matter having been tried before the Court in the presence of Bracken and Craig, attorneys for plaintiffs, McFadden, Tenore and Surinski, (John J. Bracken appearing), Craner and Nelson, attorneys for the remaining plaintiffs, (Ronald J. Nelson appearing), Nolan, Lynes, Bell and Moore, attorneys for defendant Local 11, (John J. Mulvihill appearing), and Parsonnet, Parsonnet and Duggan, attorneys for the defendant International, (Thomas L. Parsonnet appearing), and the Court having heard the testimony and arguments presented by all parties and due cause appearing for the entering of this Judgment

It is on this day of , 1977, ORDERED and ADJUDGED as follows:

Judgment

1. Defendant Local 11 shall enroll the plaintiffs as members of Local 11 subject to the provisions of Article XXI of the International constitution, subject in the case of plaintiff Durante to proof of medical qualification;

2. The defendants shall account to this Court concerning the collection of all charges of $2.50 per week from the plaintiffs beginning from the date when each plaintiff was informed by letter from defendant International in 1975 that his appeal from the denial of the transfer to Local 11 was affirmed by the International, after which this Court may award judgment to the plaintiffs in the amount of such charge actually paid by each plaintiff, such damages as may be determined being restricted as to liability to Local 11.

3. Defendants are not liable for any counsel fees for the plaintiffs' attorneys in this cause.

4. Plaintiffs demands for damages from any source except the $2.50 per week charge discussed above are found to be improper and denied.

5. Costs are awarded to the plaintiffs. Jurisdiction of the cause of retained only as to damages following the accounting Ordered herein.

6. The application by defendant Local 11 for a stay of judgment pending appeal is denied on condition that plaintiffs shall not take any steps to seek enrollment into Local 11 until such time as the request of Local 11 for a stay of judgment shall be considered by the New Jersey Superior Court, Appellate Division, Part B.

ARTHUR C. DWYER, JSC

Consent is given as to the form of the within Judgment.

Nolan, Lynes, Bell and Moore
Attorneys for Local 11

By _____

Oral Decision of Ackerman, J.S.C., July 14, 1977

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—UNION COUNTY
DOCKET NO. C-2154-75

WALTER J. SERAFIN, CHARLES O'NEILL, EDWARD KORAB, MARTIN KORAB, RONALD CRON, STANLEY F. SZARY, JR. and JOSEPH PALUS,

Plaintiffs,

vs.

LOCAL UNION NO. 480, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL-CIO, and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL and ORNAMENTAL IRONWORKERS, AFL-CIO.,

Defendants.

Thursday, July 14, 1977
Union County Courthouse
Elizabeth, New Jersey

Before:

HONORABLE HAROLD A. ACKERMAN, J.S.C.

Appearances:

CRANER & NELSON, ESQS.
By: RONALD J. NELSON, ESQ.
Attorneys for Plaintiffs

Oral Decision of Ackerman, J.S.C., July 14, 1977

NOLAN, LYNES, BELL & MOORE, ESQS.
By: JOHN J. MULVIHILL, ESQS.
Attorneys for Defendant Local 480

PARSONNET, PARSONNET & DUGGAN, ESQS.
By: GEORGE DUGGAN, ESQ.
Attorneys for Defendant International Union
and
HAROLD STERN, ESQ.
(New York Bar)

B. PETER SLUSAREK, C.S.R.,
Official Court Reporter.

The Court: Plaintiffs are eight members of various locals of defendant International Association of Bridge, Structural, and Ornamental Ironworkers Union, hereinafter referred to as the International, who seek to transfer into Local 480 of the International. The Local will be referred to hereinafter as Local 480. The Local, I might say, is also a defendant herein. Plaintiffs seek compensatory and punitive damages as well as counsel fees.

Now, at the outset, I think it is very important to recognize that one cannot fully appreciate the issues that present themselves in this case without referring to and considering the antecedent history which, really, almost spans two decades. This antecedent history consists of a series of similar events which have invited the attention of various courts on a State and Federal level from time to time.

Local 480 is one of five local unions which comprise the Northern New Jersey District Council of the Ironworkers, hereinafter referred to as the District Council. The five locals are Local 11 situated in Bloomfield, Local 45 in

Jersey City, Local 373 in Perth Amboy, Local 483 in Paterson, and Local 480 in Elizabeth, New Jersey.

During the past twenty years there have been a number of suits instituted against the members of the District Council by individuals who were members of other locals seeking to transfer into one of the locals in the District Council.

In *Hughes* v. *Local 11 of the International Association of Bridge, Structural, and Ornamental Ironworkers Union,* 287 F.2d, Page 810, certiorari denied 368 U.S., Page 829, the plaintiff therein was a prospective tranferee who had been a member of the Scranton Local of the International who had moved to New Jersey and sought to transfer into Local 11. He was a member in good standing of the International. The International, not a member to that action, informed him that transferring was a matter of local jurisdiction. However, the International constitution at that time provided that upon compliance with certain requirements the local had to admit the prospective transferee. The case was remanded by the Third Circuit to ascertain, inter alia, if plaintiff met all the requirements.

Subsequently, in *Ferger* v. *Local 483,* 238 F.Supp., Page 1016, affirmed 343 F.2d, Page 430, certiorari denied 384 U.S., Page 908, three other prospective transferees sought to be admitted to Local 483. The District Court in that case based jurisdiction on Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act, hereinafter referred to as L.M.R.D.A., 29 U.S. Code, Section 411(a)(1). The court stated that such act did not include the right to transfer among its enumerated rights. The court did, however, find that the plaintiffs were entitled to all the rights that the L.M.R.D.A. provided, but did not order their transfer.

The plaintiffs thereafter brought an action in the State court. See *Ferger* v. *Local 483,* 94 N.J. Super., Page 554, affirmed 97 N.J. Super., Page 585. In that case they sought an order of admission to the defendant local.

The International constitution, effective in 1960, under which Hughes had sought admission, did not vest any discretion in the local to turn down transferees who qualified. However, in 1964 the constitution was changed and provided that the membership of the local by majority vote could accept or reject transfer applications.

Judge Matthews, then sitting in the Chancery Division of the Superior Court, held that the pre-amended constitution was applicable insofar as the plaintiffs in *Ferger* have sought to be admitted as transferees under the old constitution. See Pages 572 and 573 of that opinion. He did, however, note the vesting of discretion in the local union, but said that he did not consider such discretion to be absolute. The court ordered that the plaintiffs be admitted to the local union, stating that they had a right to transfer in.

It should be noted that the 1964 constitution was further amended in 1968 to provide the executive committee of the local with the discretion to accept or reject transfers. That amendment was challenged by plaintiff-transferees in *Philipchuk* v. *Ironworkers,* 87 L.R.R.M. 3169, affirmed 475 F.2d, Page 1396. In that case the plaintiffs also sought a declaration that the constitutional amendment was a violation of their rights under L.M.R.D.A. The court held there that the amending of the constitution was a licit action.

Thereupon, two companion actions were instituted in the State courts: *Philipchuk* v. *The International Associa-*

tion, et al., 66 N.J., Page 539, and *Moore* v. *Local 483*, 66 N.J., 527. In those two cases the plaintiffs sought membership in the local under the constitutional provision vesting discretion in the local unio' to either accept or reject transfers. All of the transferees who had applied had been rejected by the local, and no basis or reasons for the rejection were given.

Our Supreme Court noted in *Moore* that only four transferees had been accepted into Local 483 since 1965, and that no transferee had been accepted since the 1968 amendment to the constitution. The court found that a court of equity could fashion an appropriate remedy to order transferees to be accepted as members of the local union. See Page 533 of that opinion. The court stated that, and I quote, "A rejection of an application must have a reasonable basis." See the *Moore* opinion at Page 537.

Now, prior to *Moore* a collateral development had ensued regarding the membership of the District Council. The United States of America had instituted an action against, among others, the five locals in the District Council to enforce Title VII of the Civil Rights Act of 1964, Section 701, et seq., as amended 42 U.S. Code Section 2000, et seq., hereinafter referred to as Title VII. This litigation resulted in a consent decree of December 22, 1972. The consent decree, among other things, permanently enjoined the defendants, and I quote:

". . . from engaging in or following any act or practice which has the purpose or effect of discriminating against *any* individual, or of limiting his opportunities for work referral by or *membership in the defendant Ironworkers local unions*, or otherwise adversely affecting his status as an employee, an applicant for employment or referral

in the construction ironworking trade, a member of a defendant local or an applicant for membership, *on account of his race or national origin.*"

Mr. Stern: Excuse me, your Honor. I have a long-distance call.

The Court: I will wait.

(Pause in the proceedings.)

The Court: See *United States* v. *Plumbers Local 24*, Civil Action Number 444-71, District Court of New Jersey, December 22nd, 1972.

The consent decree also contained other provisions, which included an affirmative action program, a provision designed to indenture seventy-five minority applicants each year for five years. This would result in 375 minority members if they completed the program. It was a good faith goal, which was set at twenty-five minority members each year in the apprentice program. The court retained jurisdiction in that case.

The consent decree, as ultimately amended, provided in part:

Section 33(A) "Each defendant local shall offer full journeyman membership to any black or Spanish-surnamed American who either:

"(1) has six months' experience in the Ironworking trade (including but not limited to shop work and construction laborer work); or

"(2) has successfully completed an 'approved' examination or test.

"(a) An 'approved' examination or test is any valid written examination or test capable of objective evaluation or

grading, which test reasonably measures and is demonstrably related to the individual's ability to perform the normal day-to-day work required of an average journeyman ironworker.

"(b) The validity of any such test shall be determined according to *Guideline on Employee Selection Procedures,* 29 C.F.R. Sections 1607, et seq. (1972) and the use of such test shall be approved in writing by the plaintiff prior to its use by the defendants."

33(B), "During the effective period of this Decree, to the extent that the defendant locals accept into membership individuals holding journeyman membership in non-defendant locals of the International, they shall accept or deny the membership applications of such individuals according to the rules and regulations of the defendant locals and the International governing such transfers, provided that such determinations shall be made without having the effect of discriminating against or excluding any such applicant on the basis of his race or color, or of perpetuating the effects of any such past exclusion, and provided further that all such transferees must meet the minimum qualifications under Paragraph 33(A) herein."

It should be noted that following the Supreme Court's decision in *Moore* several transferees sought membership in the locals comprising the District Council. Twenty-nine sought membership in Local 483, twenty-seven sought membership in Local 373, thirteen sought membership in Local 11, and, as pointed out previously, eight transferees, who are plaintiffs in the instant action, sought membership in Local 480.

With respect to the other three proceedings, which I might say, which I should say were brought in various other vicinages and have been decided by Judges Polow,

Dwyer, and Furman, and are presently I believe before the Appellate Division at this time, I want to say, parenthetically, in the strongest possible terms that these matters should have been consolidated pursuant to Rule 4:38-1 for purposes of trial. I certainly bear a share of responsibility for that not being done, but I think the attorneys must also share in the failure to have that done. This has been a most cumbersome situation, and I can't for the life of me understand why all the cases weren't tried together, since essentially they involve common questions of law and fact.

But it wasn't done.

Beginning in the early part of 1975, four of the plaintiffs in this action sought to transfer into Local 480. The four plaintiffs were Charles O'Neil, Edward Korab, Walter Serafin, and Martin Korab. Their initial applications were met with a letter from the local dated May 9, 1975. See Exhibit P-4 in evidence.

In essence, this letter stated that Local 480 refused to take any action on transfer applications until July 28, 1977, because of the consent decree entered in the Federal action here before referred to.

These individuals appealed to the International, contending that they had a right to transfer, and that the Supreme Court in the *Moore* case guaranteed to them that if they were rejected they would receive a list of reasons for rejection.

The International, under date of June 4, 1975, under the aegis of John H. Lyons, general president, responded ordering the locals to act on all applications for transfer and to state the reasons, should the local reject the applica-

tions. The International also required that any letters of rejection be forwarded to them.

Thereupon, the four above-mentioned plaintiffs sought to transfer again. Subsequently four other individuals, Mr. Szary, Mr. Palus, Mr. Dietz, and Mr. Cron also sought to transfer in.

The testimony and exhibits establish the following with respect to the several plaintiffs:

With respect to Walter Serafin, he has been a member of Local 28, Richmond, Virginia, since July of 1968. He lives in Elizabeth at the present time and has worked as an ironworker for nine years. He first sought to transfer in in March of 1975. He was given an interview by the board which had lasted twenty minutes, and on July 22nd, 1975, he received a letter of rejection. See Exhibit P-2.

The letter of rejection listed four reasons: (1) he was never a member in the apprenticeship program, he was not a certified welder, not an all-around journeyman; (2) he had no formal training; (3) he had no testing; and (4) the consent decree was stated as a reason for rejection.

He appealed to the International Union on August 13, 1975. See Exhibit P-3.

On October 15, 1975, general secretary of the International, Mr. Drake, informed him that the general executive board, after considering his appeal, did not find it necessary to pass upon any of the reasons, other than what they denominated as the civil rights reason. With respect to that reason, they stated, and I quote:

"With respect to the civil rights reason, the general executive board noted that every local union affiliated with

this International Association has rights of local autonomy and in accordance with this principle has the discretionary right to protect the interests of its members, provided the use of such discretion is not capricious. In this connection there is presently outstanding a United States court decree which requires and directs five local unions affiliated with this International Association—all located in Northern New Jersey, including Local Union Number 480—to admit into membership black journeymen on a quota basis and sets a goal to be reached by 1977. This decree was issued by the United States District Court on the basis of a formula that established an end result which included both the number of admissions of black journeymen and a percentage of black to white membership. If Local Union Number 480 were to transfer you and others who have applied at this time, the addition of such transfers could cause an imbalance which might prevent the local union from achieving its commitment to the Federal court because of circumstances over which it has no control.

"The general executive board recognizes, of course, that there are no limitations on the number of individuals who may be admitted to Local Union Number 480. However, as you must be aware, a serious unemployment problem exists in the construction industry at the present time and in the foreseeable future in Northern New Jersey which seriously affects the employment of ironworkers."

"Based on the foregoing, it is the opinion of the general executive board that Local Union Number 480 in its discretion has a valid reason for rejecting your application for transfer at this time.

"We understand that Local Union Number 480 operates a referral system under which qualified ironworkers who are non-members of Local Union Number 480 are referred

to jobs on the same basis as members of Local Union Number 480 which understanding is based upon the records of contributions made by employers to the welfare and pension funds, so that non-members are not being discriminated against with respect to work opportunity.

"It is, therefore, the decision of the general executive board to sustain at this time the rejection of your application to transfer your membership into Local Union Number 480."

With respect to Mr. Dietz, he told us that he has been a member of Local 361 in Queens Village, New York, for twenty-five years. He applied for transfer into Local 480 in June of '76. He was interviewed for approximately twenty-five minutes in August of '76.

The Court listened to the taped interview which was recorded by Mr. Dietz.

On September 8, 1976, his application was rejected.

It should be pointed out that he had worked in the 480 area for approximately ten years.

Now, his transfer request was denied at this time. See the letter, as I pointed out, September 8, 1976, by the local. Essentially, the reason given was the civil rights reason—if I may so term it.

He appealed. His appeal was rejected, with the same language which had been inserted in the letter to brother Serafin. See Exhibit P-9.

With respect to Martin Korab, he was a member of Local 28 in Richmond, Virginia, for the past ten years. In March '75 he sought to transfer it. As indicated in P-16 in evidence, after being interviewed on July 7, 1975,

by the executive board, his application was rejected on the ground that, among other things, that he had received no formal training in the various phases of ironworking, that he had never been tested as to his capabilities, that his work experience to date demonstrated that he had not acquired the necessary training and experience which would qualify him as an all-around journeyman ironworker, and the consent decree was also utilized by the local as a reason.

Mr. Martin Korab appealed to the International which, other than the civil rights reasons, did not pass upon the reasons for rejection offered by the local union. See Exhibit P-17.

With respect to the civil rights reason, in the same language as previously stated Mr. Drake, on behalf of the general executive board, notified Mr. Korab that the action of the local union was affirmed.

Mr. Ronald Cron, who was a member of the Scranton Local 489 for the past sixteen years, sought to transfer in. As Exhibit P-19 indicates, his application was rejected on November 17, 1975. He did not appeal to the International.

In their rejection of Mr. Cron's application, the local told him that he had received no formal training in the various phases of ironworking, that he had never been tested as to his capabilities, that his work experience to date demonstrated that he had not acquired the necessary training and experience which would qualify him as an all-around journeyman ironworker, and the civil rights reason was also utilized by the local in its rejection.

With respect to Mr. Stanley Szary, Jr., he told us that he has been a member of Local 384 out of Knoxville,

Tennessee, for the past nine years. In the summer of '75 he sought to transfer in. He was rejected by the local on July 22nd, 1975. See Exhibit P-20.

The local told him as the reasons for the rejection that he received no formal training in the various phases of ironworking, that he had never been tested as to his capabilities, that his work experience to date demonstrated that he had not acquired the necessary training and experience which would qualify him as an all-around journeyman ironworker, and the civil rights reason was also utilized.

His appeal to the International was rejected, for similar reasons, namely, civil rights reason, which was stated as to the previous applicants. That was on October 15, 1975.

Mr. Charles O'Neil, a member of Local 550 out of Canton, Ohio, for the past five years, sought to transfer in. In April of '75 he was given an interview. As a result of such interview on July 22nd, 1975, his application was rejected. See Exhibit P-21 in evidence.

The local informed him that he had received no formal training in the various phases of ironworking, that he had never been tested as to his capabilities, that his work experience to date demonstrated that he had not acquired the necessary training and experience which would qualify him as to being an all-around journeyman ironworker, and the civil rights reason was also utilized.

His appeal to the International was also rejected for similar reasons as the others.

Mr. Joseph Palus, a member of Local 28 out of Richmond, Virginia, for the past eight years, sought to transfer

in on September 16, 1975. He was interviewed by the local board, and, as Exhibit P-22 indicates, on November 17, 1975, his application was rejected for similar reasons as given as to the others, including the civil rights reason.

Mr. Palus did not appeal his rejection to the International.

Mr. Edward Korab, a member of Local 28 out of Richmond, Virginia, for the past ten years, sought to transfer into Local 480 in March of 1975. He was interviewed, and, as Exhibit P-23 indicates, his application was rejected for similar reasons as previously given to his two colleagues, including the civil rights reason.

He appealed. And, as Exhibit P-24 indicates, the International rejected his appeal for the civil rights reasons, and did not consider the other reasons.

Now, each of the individual plaintiffs, and particularly Mr. Daniel Dietz, testified that part of the benefits of belonging to the local inhered in the employment opportunities or the methods of referral from the hiring hall.

As the record clearly indicates, the Court was seriously concerned when that testimony was introduced into the case, particularly the tapes that Mr. Craner introduced into evidence, which reflected conversations with various officers and other officials of the local union—I believe the business agent and assistant business agent, primarily—so as to consider the applicability of the doctrine of preemption. As the record reflects, the Court attempted to carefully consider that problem, and delivered an opinion, the essence of which was that the Court felt that it was not preempted from considering the essential problem as to whether the plaintiffs had a right to transfer into Local 480.

I did feel at that time and still feel that plaintiffs' counsel injected into the case certain matters which were not properly before this tribunal, but which should have been presented before the N.L.R.B. I, as the record clearly reflects, therefore, excised certain portions of the record for just that reason, and my excisions have been placed upon the record.

I might say, parenthetically, as I have previously pointed out, that the transcript that we got back from the young lady who was with us for two days was kind of butchered. My law secretary at my behest has presented my suggested corrections to that transcript, particularly Pages 88 to 108, to Mr. Stern and Mr. Mulvihill, and they have indicated they have no objection to the corrections. I note that Mr. Nelson is here this morning in Mr. Craner's stead, and, as I understand it, he has informed my law secretary that he is not empowered to pass judgment on it. Since this case, one way or the other, is going to be appealed, I am ordering you, Mr. Nelson, to have Mr. Craner, without any delay, go over the suggested corrections, since your adversaries have already indicated they have no objection to the corrections, so that the Appellate Division will have an accurate transcript. That is most important. And it is in accord with the Court's remarks previously expressed during the course of this hearing.

But, in any event, as I have indicated, the Court felt that with respect to the essential question presented to this Court this Court had jurisdiction to consider same. I incorporate within my opinion today what I said previously with respect to the issue of preemption.

Now, it is clear to me that where the constitution and bylaws form a contract between the union and its members the states are competent to decide a situation such as this.

As pointed out by our Supreme Court in *Moore,* and I quote, "Judicial intervention in the internal affairs of a union will be exerted for the protection of a property right or the enforcement of a contract as expressed in the union's constitution." See Page 535 of that opinion.

It was noted in *Hinchman* v. *Local 130, IBEW,* 299 Southern 2d, Page 818 at 820, where the transferee was not seeking to be accepted into Local as a local member and was not suing for the wrong done to him for activity solely between himself and the union, rather, he was suing for alleged wrongs done to him by the union involving his employer, the State court was preempted.

It should be noted, however, that in the instant case the plaintiffs seek to be transferred not on the basis of discrimination in employment—although, as I have noted, some evidence to that effect has crept into the case, but, as I pointed out, was not considered to and is not being considered in deciding this case. They seek to transfer on the basis of the intangible benefits of participating, to be derived by virtue of participating in the local union's internal affairs. It is my judgment that this is within the sphere of union activities in which the state courts have authority. It is clear to me that this Court is not thereby preempted from dealing with this issue.

Moore and its companion case, *Philipchuk,* determined that there is an economic benefit to belonging to a local union. In support of this proposition the Supreme Court in *Moore* cited *Directors Guild of America, Inc.* v. *The Superior Court,* 409 Pacific 2d, Page 934 at 941, a case decided by the Supreme Court of California in 1966. That court said, and I quote:

"Membership in the union means more than mere personal or social accommodation. Such membership affords to the employee not only the opportunity to participate in the negotiation of the contract governing his employment but also the chance to engage in the institutional life of the union. . . . Participation in the union's affairs by the workman compares to the participation of a citizen in the affairs of his community. The union, as a kind of public service institution, affords to its members the opportunity to record themselves upon all matters affecting their relationships with the employer; it serves, likewise, as a vehicle for the expression of the membership's position on political and community issues." See Pages 941 and 942 of that opinion.

Thus, the Supreme Court of New Jersey and the Supreme Court of California in *Moore* and the *Directors Guild* cases respectively define the outer limits of the economic necessity doctrine which was expressed in *Falcone* v. *Middlesex County Medical Society,* 34 N.J., Page 582, which I might point out was noted in the Harvard Law Review, 75 Harv. L. Rev., Page 1186. That doctrine, as expressed in *Falcone,* states that where membership in an organization is necessary to practice that occupation courts have the power to mandate admittance. The doctrine of economic necessity requires the court to be "alert to the need of protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization." See *Falcone,* cited supra, at Page 592.

This is a balancing test. The organization standards for admittance and its objectives, as I perceive it, are weighed against the individual's need to belong to the union, to exercise in the fuller sense his occupation and membership therein.

Moore stands, as I pointed out, at the outer limit of the economic necessity doctrine, as the individuals concerned were union members but not members of the particular local. See also *Pinsker* v. *The Pacific Coast Society of Orthodontists,* 536 Pacific 2d, Page 253 at Page 261, Note 11, decided by the California Supreme Court in 1974. Under the law they could not be deprived of a means of livelihood, for should they be deprived of the right to be referred to union jobs they certainly would have the right to file an unfair labor practice under the Labor-Management Relations Act.

As I perceive it, our Supreme Court in *Moore* fills the gap between the economic necessity doctrine, as enunciated in *Falcone,* and the outer limits of the L.M.R.A., so-called Taft-Hartley Act.

Thus, there is a thin line separating relief under *Moore* and relief under the L.M.R.A. which is vested in the N.L.R.B.

I have already passed on that problem.

It is beyond cavil that the courts of this State have the power to order admission to the union of members. See Page 533 of the *Moore* opinion.

Moore provided, however, that a balance test should be employed in determining whether or not to order such admissions. The Supreme Court in that case stated, and I quote, "It is not within the province of this court to formulate guidelines for the exercise of discretion by the local union." See Page 537 of the opinion. The obligation to formulate such guidelines belongs to the union.

Using these guidelines, the union can consider the application of a transferee for membership. The transferee cannot be arbitrarily rejected. His qualifications must be considered, or the local union's executive committee must discuss the matter, or a statement of the reasons must be presented.

The local may thereafter reject a transferee's applicaton, but the rejection "must have a reasonable basis." See Page 537 of that opinion.

Specifically not acceptable as a reasonable basis is "a decision to restrict membership to those who have participated in an apprenticeship program." See Page 537 of the opinion.

Thus, the first two reasons given to the applicants, plaintiffs in this action, relating to no formal training and lack of testing as to capabilities, as set forth in the letters received by the plaintiffs, I find do not form a reasonable basis for rejection.

Wtih respect to the latter two reasons, namely, that they were not all-around journeymen and the consent decree, it is important to note that one rationale, as I see it, for having a list of reasons is that the International on appeal can determine whether it was a reasonable exercise of discretion. This, of course, is to insure that members utilize the internal remedies provided to them initially. That does not end the matter, however; it merely provides the affected individual with another arrow in his quiver before resorting to the necessity of seeking redress from the courts. Of course, hopefully, many of these matters can be resolved within the family of the union.

Our Supreme Court in *Moore* has said that non-locals, as I term the plaintiffs in this action, have a right to

transfer, and that local unions have a right to reject their applications if the rejections are grounded upon a reasonable basis. The unions can develop guidelines. The courts, however, have an obligation to see that a reasonable basis exists in the last analysis by balancing the individual's need to transfer against the union's standards.

However, as I perceive it, the last two reasons advanced by the local referred to above concern the consent decree entered into before the Honorable Leonard Garth, then a judge of the United States District Court and now a member of the Circuit Court of Appeals for the Third District.

The consent decree, as formulated, was an affirmative action program designed to provide a specific number of minority apprentices. See Paragraph 38(C). In the decree it was pointed out that the joint apprenticeship committee, and I quote, "shall select and indenture each year no fewer than seventy-five minority applicants that qualify, if available, in the ironworker employer training program and in the apprenticeship training program under the selection procedures listed above for a period of no less than five years. The good faith goal shall be to indenture no less than twenty-five minorities in the apprenticeship program." The optimum figure, therefore, would be 375.

The decree expressed numbers and not a percentage.

At the time it was effected there were, as I understand it, 1400 local members in the District Council, and apparently approximately 1900 non-locals.

While the round number was expressed, it was the testimony of the individuals entrusted with the responsibility of negotiating with the government that in reality

the figure was arrived at as a compromise, and that the government was attempting to obtain between 20 and 25 percent union membership. Had the union remained constant, and had 375 minorities been accepted, the total would have been 1775, which would have, percentagewise, approximated 21 percent, or within the number stated by the witness, Mr. A. Thomas Hunt, who represented the United States of America at the time the consent decree was formulated.

Mr. Hunt, who generally impressed this Court with his sincerity and dedication to the affirmative action principles underlying Title VII, and who testified that he is presently in private practice in California engaged in the same type of work, listed several reasons for this size of a contingent minority. (1) He pointed out the relative reflection of the racial breakdown of the applicable community, namely, Northern New Jersey; (2) The creation of a significant power bloc within the union; (3) Consideration of the amount of work available.

Mr. Hunt stated that there was a necessity for not making the apprenticeship program an all-minority program, because if it were all that there would be, in his words, a second-class stigma, and it would remove access to the union for white apprentices.

While Mr. Hunt stated that it was assumed that there would be attrition among the white members, so that the ultimate population would be 1700, which, percentagewise, would amount to 22 percent, he stated that it was his and the government's assumption that the union would not allow transferees in as it would be against not only the interests of the minority members but also against the self-interest of the enfranchised local union members.

Cast in this light, the essential question is: Is the consent decree a valid reason for denying the transferees into Local 480?

In the first place, the consideration of the amount of work available is not a factor, as the transferees are union members and cannot be considered as deleterious to the consent decree in this regard as they, whether demoninated as locals or non-locals have the same Federally guaranteed right to work and the Labor-Management Relations Act and L.M.R.D.A.

The second criterion, creation of a significant power bloc, collides with the very reason the transferees want in. They also want some say in the union. They have a right to be considered, because the union's constitution allows them a right to be accepted as a transferee, in the discretion of the local's board, who must provide the transferees with a reasonable basis for rejection. This right is an individual right.

Further, as the witnesses testified, it is a "hoped for" occurrence.

The government, Mr. Hunt pointed out, wanted bloc of 20 percent or thereabouts—I might point out a goal that has not been achieved even though no transferees have been accepted. As I understand it the goal now has been advanced to 1980, is that correct?

Mr. Mulvihill: Timewise? I don't think there is a time limit, Judge. I am not sure.

The Court: Well, there is no time limit, then.

Mr. Stern: They mentioned 1979.

The Court: I think you are correct, Mr. Mulvihill. There is no time limit at this time.

Mr. Mulvihill: I think there was an order entered by Judge Meanor recently, Judge. 375 remains, but—

The Court: Moreover, there is no reason to suspect that the minorities will aneal into a bloc of 20 percent, or that even to do so is in their best interest.

As Mr. Hunt pointed out, an assumption was that once they became union members their interests would dovetail with other union members, and that they would keep out transferees.

This unity of membership is a hoped-for goal, but certainly, the transferees have a contractual right of a property nature which cannot be deprived by a mere assumption. The law requires much more before a right is so lightly disposed of.

If the government feels that the union is subverting the consent decree, the government has a remedy: It may apply to the court wherein the decree was rendered, as the court has retained jurisdiction.

At issue in this case are three kinds of discrimination: First, as I see it, historically the District Council members have discriminated against allowing transferees in. The vast panoply of litigation regarding these locals as to this issue alone has been outlined above. There is very strong evidence here that this sort of discrimination has not had a racial basis, but has in fact had its basis in a feeling amongst the union members that membership in the union should be accorded to members of the union members' family. This came through very strongly to me, and I have no difficulty in accepting that proposition—when I say accepting it, accepting that it existed.

Secondly, there was a pattern of discrimination which violated Title VII, which resulted in the consent decree.

Thirdly, when the transferees were attempting to transfer into the union they were refused admission because they were white and this would upset the racial balance which the union alleges it was attempting to achieve. This is the so-called pattern of reverse discrimination.

There are several innocent parties. The minority members who are excluded because of their race are certainly innocent parties. To them the consent decree promised and promises a vehicle of admission by which they can penetrate the union and become members—certainly, a highly laudable goal.

The transferees, who are plaintiffs in this action, are also innocent parties. They have not belonged to the local unions. In fact, they have been excluded, with albeit less harsh consequences.

The locals in question, however, obtained the consent decree which was to remedy the past acts of discrimination on the part of the locals. They now urge, that is Local Union 480 now urges that the consent decree designed to remedy the wrong, their wrong, now allows them to continue the two other patterns of discrimination.

In *McAleer* v. *American Telephone and Telegraph Company,* 416 F.Supp., Page 435, an employer had entered into a Title VII consent decree which contained an affirmative action program to remedy past sex discrimination. The employer when faced with a suit instituted by a male who had been passed over by a female with less seniority and experience defended by urging that it was following the terms of the consent decree. The court said, and I quote:

"It is true that A. T. & T. was following the terms of the consent decree, and ordinarily one who acts pursuant to a judicial order or other lawful process is protected from liability arising from the act. . . . But such protection does not exist where the judicial order was necessitated by the wrongful conduct of the party sought to be held liable. . . . Here the consent decree on which defendant relies was necessary only because of A. T. & T.'s prior sex discrimination. Under these circumstances the decree provides no defense against the claims of a faultless employee such as McAleer." See Page 440 of that opinion.

While the court did not order McAleer to be promoted, it did find that he was entitled to an award of damages based on a concept of "rough justice." The matter was subsequently settled between the parties.

I refer the parties to a note in the Loyola-Chicago Law Review, Volume 8, Page 369, entitled The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance.

In light of the District Council's past record of intransigence on the issue of allowing transferees in, I find that the consent decree cannot be used to provide a reasonable basis for rejection by the local union which participated therein. The consent decree by its own terms forbids any practice which has the purpose or effect of discriminating against *any* individual which limits his opportunity for membership in the defendant union on the basis of his race.

The consent decree, in my judgment, has provided the local union with a convenient reason to continue its policy of discrimination against non-locals by wholesale rejection of any applicant who seeks to transfer in.

In my judgment the use of the consent decree is a thin scrim to cover the union's refusal to accept transferees.

Judge Matthews remarked in the *Ferger* case, the suggestion that the discretion "given to local unions under the constitutional provisions . . . is one of unbridled nature" is unacceptable. He said, and I quote, "It is not difficult to conceive of a situation in which the exercise of the discretion granted to local unions might become arbitrary or unreasonable. Obvious examples would be the refusal to accept a member by transfer solely because of race, creed, or ethnic origin." See Page 573 of that opinion.

This, in my judgment, underscores the necessity for guidelines which are lacking in the instant case.

Succinctly, then, the use of the consent decree does not fall within the meaning of the term "guidelines" announced by the Supreme Court in *Moore*.

There is no evidence before this Court that any but the eight individuals seek to be admitted. While there may be others waiting for the outcome of this decision before throwing their cards in, as the term was used in this case, that is applying to transfer in, the simple fact is that the local by adopting appropriate guidelines may not have to accept them all. But the union cannot, grasp any convenient reason to mask an attempt to deny any transferees their right to transfer. The desire of the union to live up to the settlement it signed with the government, as I pointed out previously, is a laudatory end in itself but, in my judgment, it does not explain the union's failure to follow the Supreme Court in *Moore* to develop guidelines, nor can it be used as a guideline in itself for it fails to give appropriate notice

to any transferee as to what requirements he must meet in order to be granted the right to be admitted as a transferee.

Finally, in my judgment, the consent decree merely redresses one pattern of discrimination, and cannot be used to discriminate against other innocent third parties.

Thus, given the clear mandate of *Moore,* it is clear that the reasons given by the union do not form a reasonable basis for rejecting these eight individuals.

Now, we have a question with respect to several of the individuals with respect to their alleged failure to exhaust their administrative remedies. Three of the eight individuals, as I pointed out previously, did not appeal their rejection to the defendant International.

It is contended that as to these three plaintiffs there was a failure to exhaust their remedies in that they failed to appeal their rejection to the International, and that this failure on their part means that this Court should not consider their claims.

Plaintiffs contend that they received the same form of letters as the other rejected applicants and, therefore, deemed it futile to appeal any further rejections and began this suit with the other plaintiffs. Plaintiffs, therefore, contend that they took every reasonable appeal necessary.

As pointed out in *Jorgensen* v. *Pennsylvania Railroad,* 25 N.J., Page 541 at 556, and I quote:

"The doctrine of the exhaustion of remedies is well established in New Jersey. *Ward* v. *Keenan,* 3 N.J.,

Page 298. The rule has been applied to members of labor unions or other voluntary organizations seeking reinstatement or damages from the organization, where there has been no showing that resort to the internal remedies provided for in the constitution or bylaws of the organization would be futile, illusory, or vain."

I have omitted the citations.

The *Jorgensen* case further pointed out at Page 558, and I quote:

"It is true that the doctrine of the exhaustion of remedies is not an absolute rule and is subject to several exceptions in New Jersey. For example, the doctrine has not been applied where the disposition of the matter depends solely on the decision of a question of law, *Nolan* v. *Fitzpatrick,* 9 N.J., Page 477; or where the jurisdiction of the administrative tribunal is doubtful, or where the charges asserted are so palpably defective as to make the jurisdiction of the tribunal merely colorable. *Ward* v. *Keenan,* 3 N.J., Page 298; or where the administrative remedies are futile, illusory, or vain. *Naylor* v. *Harkins,* 11 N.J., Page 435."

See also *Local Union Number 14* v. *United Association of Journeymen,* 61 N.J. Super., Page 2, and *Cameron* v. *International,* 118 N.J.Eq., Page 11 at Page 19.

In *Madden* v. *Atkins,* 151 N.E.2d, Page 73, a case decided by the New York Court of Appeals, the court said, and I quote, "The obligation imposed upon an union member is no more than to use all reasonable means to make use of the remedies available to him within the union organization before resorting to the courts." See Page 77 of that opinion.

In *Woods* v. *I.B.E.W.*, 91 LRRM 2704, a case out of Georgia, Northern District, the court said, and I quote, "A bare claim or allegation of futility is insufficient to escape the exhaustion provisions of the L.M.R.D.A. However, in the present case the court finds that it has made a concerted effort to comply with the spirit of the intraunion remedies." The court found it to be no bar to resort to the court. See Page 2707 of that opinion.

In the instant action the parties all knew each other and had discussed their course of action in the face of rejection.

Under the circumstances, I find that the plaintiffs did not fail to exhaust all meaningful administrative remedies.

What about the responsibility and liability of the International.

The defendant, International Union, asserts that they are not a proper party to the action, and that there is no allegation of bad faith or malice on their part, and that the International acted as a mere appellate body.

The International contends that the constitution vests the local union with determining the right to membership. The local is the body which determines union membership, the International contends, and that if there is a rejection then the member can take an appeal to the International. However, the International contends that its decision cannot be the basis of liability unless there is bad faith or malice.

I might say I listened very carefully to the testimony of President Lyons. I was very impressed with his testimony. He obviously, in my judgment, recognizes the

problem at hand as it exists today and as it has existed for many years.

It is my judgment, after carefully considering his testimony, for reasons which I will more adequately outline in a few minutes, that he and the International have acted in good faith.

He has got a problem on his hands. One of the problems, as I perceive it, is the autonomy that exists in the local unions. It's not an insoluble problem, but it's a difficult problem. It is obvious to me after listening to his testimony.

It should be pointed out, in *Franklin Electric Construction Company,* 121 N.L.R.B., Page 143 the Board stated that an International is not automatically responsible for the legal wrongs committed by the locals. In that case there was no evidence that the International exercised supervisory powers, because the agent of the International did not have the power to ratify the conduct of the local. The Board stated, and I quote, "a local union is a legal entity apart from its International and that it is not a mere branch or arm of the latter."

In *Lusk* v. *Plumbers,* 84 L.R.R.M., Page 2263, where there was "no evidence of any involvement on the part of the union to refuse to admit the plaintiff to membership" the court granted a summary judgment at the close of plaintiff's case.

In a series of cases in New York the Court of Appeals of the State of New York held that when there is an appeal to the International there is no liability for the International's decision upholding the local in the absence of bad faith or irregularities, even if that determination is erroneous. See *Shouten* v. *Alpine,* 109 N.E., Page 245,

decided by the New York Court of Appeals 1915; *Ehrlich* v. *Maggiore,* 61 L.R.R.M., Page 2041. See also *Madden* v. *Atkins,* 151 N.E.2d; and also see *United Brotherhood of Carpenters* v. *N.L.R.B.,* 286 F.2d., Page 533 at Pages 538 and 539.

It is clear that the plaintiffs are members of the International. It is also clear that the discretion to reject or accept is vested in the local and it is proper for the local to have such discretion.

The central question is the degree, and therefore the liability, of the defendant International's involvement in the instant action.

The last amendment to the constitution was in 1968, which was not only long before this case but was long before *Moore* was decided. Consequently, in my judgment, the International cannot be implicated on that basis in depriving plaintiffs of their right to belong to the defendant local.

All of the cases prior to 1968 involved transferees and the locals of the District Council. The International was not a party to these actions. Moreover, the International was not a party to the 1972 litigation that resulted in the consent decree.

The decree was to remedy the District Council's discrimination, not the discrimination, if there be any, of the International.

Parenthetically, I think it is important to note, the AFL-CIO, of which the International is a constituent member, under the leadership of President George Meany, in my judgment based on my reading—and I will refer to the articles in question in a moment—has led the fight

to have a fair employment practices section written into the Civil Rights Act of 1964. That section became Title VII. The leadership of the AFL-CIO pressed for Title VII because, and I quote, "The AFL-CIO is a federation of affiliates which retain a relatively high degree of autonomy. The parent body can urge compliance with its policies, but the decision to act is left up to affiliates. Meany felt that the only way the AFL-CIO could deal effectively with unions practicing discrimination would be to demand compliance with the law of the land." See an article entitled The Blacks and the Unions, written by Bayard Rustin in Harper's Magazine at Pages 75 and 76 in May of 1971. Thus, Meany was determined to have such a section passed to correct the shortcomings in labor's own ranks.

Consistently many other labor leaders have opposed discrimination because it creates a pool of non-unionized workers who stand as a threat to the union in terms of job security and wage benefits. See the same article at Page 77.

Thus, among labor leaders today William Pollard of the AFL-CIO has stated that the unions realize that it will cost them money to violate employment laws like Title VII and are changing their practices to insure that they do no violate such laws "without waiting for the E.E.O.C. to catch them." See U.S. News and World Report at Page 36, the issue of December 13, 1976.

When the International received notice from the transferees of the rejection of their right to transfer based on the consent decree, I find that the International acted in good faith with the laws of this land in upholding the unions' determination, the local union's determination for the reasons that they gave.

Now, what is good faith?

Well, our former Chief Justice, Chief Justice Weintraub, in a case involving our Fraudulent Conveyance Act, *Smith* v. *Whitman,* 39 N.J., Page 397, adopted a definition there I think from Bowier's Dictionary—I am not quite sure; I know it was a dictionary—in which that definition was given as follows: "Honesty of purpose, integrity of conduct." In my judgment, it's as workable a definition in this case as it was there.

In my judgment, the International's actions and goals are clearly distinguishable from those of the local in this case. I believe Mr. Lyons' testimony when he stated that the International, as a constituent member of the AFL-CIO, has followed a consistent pattern of implementing the mandates of Title VII. Thus, when the International was confronted with the local's rejecting members ostensibly for the reason of compliance with the Title VII consent decree, I find it was an exercise in good faith to uphold the local's determination.

The local, I find, was not acting in good faith. I find that it was merely using a court order to continue its long history of discrimination against transferees. To continue to discriminate against one group that has historically been discriminated against on the basis of the consent decree was, in my judgment, bad faith on the part of the local. The local merely had to adopt guidelines for accepting transferees. That was within its power. It did not do so. Instead, the local attempted, in my judgment, to hide behind the consent decree to continue its past practices of discrimination against similar transferees.

In *United Mine Workers* v. *Gibbs,* 383 U.S., Page 715 at 735-737, the court held that an International was relieved of its responsibility for damages done by the local or committed by the local without clear proof that the International gave prior authorization or ratified such acts after actual knowledge of the commission of illegal acts.

In the instant case I find there is no liability on the part of the International. I find that it acted in good faith.

Let us deal with the question of damages—compensatory, in the first instance.

Plaintiffs contend that the loss of membership in the union was a tortious deprivation of membership in the union and that they lost the right to attend meetings, elect officers, be candidates, participate in the governance of the union's work for contract changes, and enjoy the benefits of being a local. Plaintiffs contend that the Federal courts have given recognition to damages for these deprivations. Moreover, plaintiffs contend that the constitution as a contract which defendants have breached. Plaintiffs seek to recover $2.50 per week per member, which are designated as travel service dues, or dobies.

Plaintiffs seek to be restored, and they claim they do not have to prove damages with a degree of exactitude.

Defendant local union contends that the plaintiffs have failed to comply with itemized statement of damages, and that the issue of damages is one properly for the N.L.R.B.

In *Talavera* v. *Teamsters,* 81 L.R.R.M. 2881, the court found that the plaintiff may recover for all damages directly and proximately resulting from violations of the Act and allowed recovery for pain and suffering because plaintiff had been tortiously deprived of membership.

As pointed out in *Ench* v. *Bluestein,* 52 N.J.Super., Page 169 at Pages 173 and 174, and I quote, "It is an accepted principle of law that in all litigation, of whatever kind, the law seeks to compensate for the wrongs complained of so as to restore the injured party to his former status. Except where punitive damages are permitted, there is no allowance of more than nominal damages in a case where no actual damages are proven."

As also pointed out in *525 Main Street Corp.* v. *Eagle Roofing,* 34 N.J., Page 251, and I quote, "Compensatory damages are designed to put the impaired party in as good a position as he would have been if performance had been rendered as promised." See also *Barr and Sons,* 90 N.J.Super., Page 358 at 374.

Where a breach of contract has occurred, the following rules are applicable, as pointed out in *Louis Schelsinger Co.* v. *Rice,* 4 N.J., Page 169, and I quote:

"Generally, the recoverable damage for a breach of contract is the loss directly and naturally ensuing from the breach in the ordinary course of events. It comprises such losses as would probably result in the ordinary course of things from a breach of the contract under the special circumstances known to the parties at the time it was made."

There must always be a reasonably accurate and fair basis for the computation of alleged lost profits. See *Kempfer* v. *Deerfield Packing Corp.,* 4 N.J., Page 135.

Compensatory damages for the breach of a contract must be such as would arise naturally as a result of the fault of a defendant and must be such as may be fairly and reasonably supposed to have been in the contemplation of the parties when the contract was made. Damages which are remote, speculative, and problematical cannot be recovered. See *Borbonus* v. *Daoud,* 34 N.J.Super., Page 54 at Page 61.

However, as pointed out in *Tessmar* v. *Grosner,* 23 N.J., Page 193 at Page 203, and I quote:

"If the evidence affords a basis for estimating the damages with some reasonable degree of certainty, it is sufficient. . . . The rule relating to the uncertainty of damages applies to the uncertainty as to the fact of damage and not as to its amount, and where it is certain that damage has resulted mere uncertainty as to the amount will not preclude the right of recovery. *Oliver* v. *Autographic Register Company,* 126 N.J.Eq., Page 18 at Page 25."

The burden of proof is on the alleged damaged party. See *Barr and Sons cited supra,* Page 375.

Courts may tailor the measure of damages to meet the exigencies of the particular situation. See Page 375 of that opinion.

In short, courts, quote, "always apply rules of damages flexibly to assure justice." See *Zeliff* v. *Sabatino,* 15 N.J., Page 70 at Page 74.

In the instant case the defendant local contends that damages against the union are not properly assessed by a State court, and that it has been preempted in this area from awarding such damages.

In *Zarelli* v. *Operative Plasterers,* 125 N.J.Super., Page 412, where the action was based upon a tort alleging that the defendant union had tortiously interefered with prospective economic relationships, the court held that, quote,

"Such matters have been preempted by the Federal government by virtue of the National Labor Relations Act."

In *Association of Journeymen* v. *Borden,* 373 U.S., Page 690, the Supreme Court of the United States reviewed the law concerning the propriety of a State court awarding *Association of Machinists* v. *Gonzales,* 356 U.S., Page 617 for the proposition that when a lawsuit is focused on purely internal "union matters, on relations between the individual plaintiff and the union, and not having to do directly with matters of employment, and that the principal relief sought was restoration of the union membership rights" that in this posture the court could award as collateral relief compensatory damages for loss of employment. See Page 697 of that opinion.

In *Local Union Number 207* v. *Perko,* 373 U.S., Page 646, the court noted that the plaintiff was not attempting to secure any redress for loss of his rights as a union member, so that there was no permissible State remedy to which the award of consequential damages might be subordinated. See Page 705 of that opinion.

Under these decisions the distinction must be whether or not the matter is purely an internal union matter or if it involves outside unfair labor practices. In the former instance, the State court has the power to award damages as a collateral remedy; in the latter the court is without jurisdiction.

This is not a case where the transferees have been denied membership in a union, as they are union members, and, therefore, the rationale of *Talavera* v. *Teamsters,* cited supra, in my judgment is not apt.

As pointed out in *Borbonus,* cited supra, damages which are remote, speculative, or problematical cannot be re-

covered. See also *Rommell* v. *U.S. Steel Corp.,* 66 N.J. Super., Page 30 at Page 46.

Had the union delneated its guidelines, these indviduals may well have been found not to have a right to transfer, as the union in the proper exercise of its discretion may have denied them admission. On the other hand, they have met the standards. To speculate as to either outcome is merely that: Speculation.

This Court cannot, in my judgment, with any reasonable basis ascertain the value of the loss complained of.

Compensatory damages, however, I find may be awarded for the dobie charges actually incurred by the plaintiffs since they were rejected.

As for the claim for punitive damages, in my judgment this is clearly not a case for such damages. In the first place, the stated purpose of following the consent decree negates actual malice or indifference to members' right to transfer. The belief, no matter that it was not so, that the consent decree prevented them from accepting transferees —while it continued forward the wholesale denial of a right to transfer—in my judgment, after careful consideration of the problem, and it's a close question, I concede, at this point, is neither the stuff of actual malice nor the essence of an indifference sufficient at this time to award punitive damages.

Moreover, in *Woods* v. *I.B.E.W.,* 91 L.R.R.M. 2704, 2709, the court said that if a union acts with actual malice or reckless or wanton indifference to a member's rights that punitive damages could be properly assessed.

In *Berg* v. *Reaction Motors*—and I don't have that citation for you, I am sorry—the court said, and I quote, "In tort law damages are generally intended to compensate

rather than punish. In exceptional instances courts have recognized awards above full compensation for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example. Such exemplary awards are often described as punitive damages and sometimes as smart money."

In considering punitive damages there are two grounds upon which to award them: (1) Actual malice or (2) an act accompanied by a wanton and willful disregard of the rights of another. The requirement of willfulness or wantonness must come from a positive element of conscious wrongdoing which can be satisfied by "showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." See Page 414 of the *Berg* opinion.

Exemplary damages are generally "awarded only where the defendant's wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime." See *Security Corp.* v. *Lehman Associates, Inc.*, 108 N.J.Super., Page 137 at 142. The grounds for punitive damages are as stated above in the *Reaction Motors* case. Punitive damages are not given because compensatory damages are difficult to ascertain. See *Sandler* v. *Lawn-A-Mat Chemical and Equipment Corp.*, 141 N.J.Super., Page 437 at Page 448. They can, however, be given even though compensatory damages are de minimis. As noted by Judge Larner in that opinion. See also *Winkler* v. *Hartford Accident and Indemnity Company*, 66 N.J.Super., Page 22 at 29.

Of course, when an action is brought both in contract and tort there may be a recovery for punitive damages. See *Frega* v. *Northern New Jersey Mortgage Association*, 51 N.J.Super., Page 331 at 339.

The right to award punitive damages, of course, lies within the discretion of the court. The trial judge, as pointed out in *Sandler*, and I quote, "must take account of the applicable law and the particular circumstances of the case."

As I have already said, this case is not one which, in my judgment, calls for the imposition of punitive damages.

What about counsel fees?

Plaintiff cites an Ohio case, *Channell* v. *N.C.R. Industrial Union*, 79 L.R.R.M., Page 2490, which allows counsel fees in a case like this one. However, in New Jersey fees in this particular case are regulated by Rule 4:42-9.

Plaintiffs allege that the result of this action will be to confer a benefit on all members, and when such a benefit is conferred that it is appropriate to award counsel fees. Plaintiffs contend that attorneys' fees are appropriate as reimbursement to a party, and that plaintiffs here are doing more than merely advancing their own case and that the end result will be the right to transfer.

Ordinarily the rule is that counsel should look to his own client for compensation. That is, the policy of this State is that Rule 4:42-9 lists the exceptions when counsel fees can be imposed, and "that except in the situations within its terms each litigant shall bear the expenses of prosecuting and defending his individual interests." See *Sunset Beach Amusement Corp.* v. *Belk*, 33 N.J., Page 162 at 167.

The rules provide that no fees are to be allowed for legal services, except as provided by the rule or by statute. The purpose of this rule was to curb "the broad gen-

eral powers of the former Chancery Court judges to award discretionally counsel fees." See *Cohen* v. *Fair Lawn Dairies, Inc.*, 86 N.J.Super., Page 206 at 215, affirmed 44 N.J., Page 150.

In *Sunset Beach* the court discussed that amorphous category, fund in court, and said that it was "a shorthand expression intended to embrace certain situations in which equitably allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs. The difficulty with the term is that literally it may connote a fund within the precincts of the court in a physical or geographic sense, whereas 'in court' refers to the authority of the court to deal with the subject matter. . . . And, for that matter, the existence of power in the court to control the subject matter is not itself enough to demonstrate the existence of a 'fund in court' within the purpose of the rule."

When the party, however, succeeds in benefiting a class and the services redound to the class as well as to himself, the benefit created thereby can be charged against the subject matter pro rata.

I don't have the citation before me, but I should also point out—and I don't believe that this case falls within the doctrine enunciated by Justice Jacobs in the *Red Devil Tool* case.

In order to establish a fund in court plaintiffs would have to establish that they were benefiting a broader class than merely themselves.

The right to transfer, as I pointed out previously, is an individual right which must be tested case by case. The union has a right, using proper guidelines, to deny any prospective transferee the right to transfer in. At issue

here is an individual property right. There is no right for any other than the individuals before the Court to transfer in.

Thus, there is no fund in court sufficient to hold that plaintiffs are entitled to counsel fees, and the application therefor is denied.

In light of the Court's finding here today, for the foregoing reasons, in the language of Judge Matthews in *Ferger*—which, in my judgment, is as viable today as it was then—to use his language, Page 575 of the *Ferger* opinion, quote: "I direct that the officers and members of defendant Local refrain from excluding each of the plaintiffs from membership in the Local, and further, that they accept into enrolled membership of the Local each of the plaintiffs so that each may be accorded and exercise all of the rights and benefits under the constitution of the International Union." End of quote.

Mr. Nelson, I would ask you to draw an appropriate order consistent with this Court's findings.

And I remind you that before this case, the record of this case is sent to the Appellate Division that I expect Mr. Craner to take a look at that transcript and see if those corrections are okay, so that we can send the Appellate Diivsion as accurate a record as possible, if the case is appealed.

Mr. Nelson: Judge, I will do that, and I hope that this week we can take care of the administrative matter of correcting the record.

In terms of the order, then, that shall be prepared, was your reference to Judge Matthews' language for the purpose of my including that very language in the order?

The Court: That is absolutely correct. I think the language is apt, and it is certainly appropriate.

I want them admitted into this local union forthwith.

Mr. Nelson: Yes, sir.

The Court: Mr. Mulvihill?

Mr. Mulvihill: Yes, sir. Just a housekeeping item, Judge.

At the end of the trial we submitted into evidence Mr. Duff's transcript of his testimony, and I think it was left open as to what you would consider and not consider. I notice you didn't refer to it in your opinion. I take it that the whole thing would have been considered by your Honor.

The Court: I certainly did. Absolutely.

Mr. Mulvihill: Judge, the other item, as far as an application for a stay is concerned.

The Court: That's appropriate in light of the fact—

Mr. Mulvihill: Which, as your Honor is probably aware, or might not be aware, in the *373* case the Appellate Division did enter an order staying it.

The Court: I have no quarrel with that proposition. There are three other cases before Judge Matthews. As I leave the bench this morning, in accordance with a personal request he made of me to let him know when I have decided the case—I don't know whether he is on vacation—but I am certainly going to let his office know, because I promised him that. It's not only a personal promise, I think in a professional sense the Appellate Division, that particular part thereof, deserves to know when I am finished with the case. It's as simple as that.

I might say—I am looking at you, Mr. Stern—I think Mr. Nelson can include in the order the fact that the International is relieved of liability.

Mr. Nelson: I certainly will.

The Court: I might note for the record the sad fact

that since we finished the case Mr. Thomas Parsonnet passed away, so he is not with us today for that reason, and Mr. Duggan is here in his stead.

Mr. Stern: Your Honor, I want to ask one question with reference to your opinion.

The Court: Are you finished, Mr. Mulvihill?

Mr. Mulvihill: No. I am just a little bit up in the air. As far as the stay is concerned, shall we make—can I make an application before the Court now?

The Court: You can make it now, and I will grant it. I don't think there is any problem. I think it's a practical thing that should be done.

Mr. Mulvihill: Thank you.

Mr. Nelson: Judge, we will abide by the same pattern that has been established in prior cases.

The Court: No problem.

Mr. Nelson: Might I ask one further question? With respect to the International, it is in effect the holding without costs against the plaintiffs, without costs, since they may have incurred during the course of trial some expenditures for transcripts and the like.

The Court: That's correct. Mr. Stern?

Mr. Stern: Your Honor mentioned in the course of his opinion the return of the travel service dues, or dobies.

I am raising the question for a little clarification.

In the trial before Judge Dwyer—and I am not saying anything, I am just asking (this is a matter of information—that matter was discussed during the trial. I pointed out to Judge Dwyer that the dobie fees, the part that goes to the International, does not go to the International but, under the constitution, goes to the pension fund of which all members of the International are participants.

The Court: I don't care where the money went. I just want the money back.

Mr. Stern: From whom, your Honor?

The Court: Well, whoever has the money. I don't know how I can put it any plainer.

Mr. Nelson: Judge, that does raise a very serious problem. We did have to consider it before Judge Dwyer.

The Court: How did he deal with it? Can you enlighten me?

Mr. Nelson: Portion of that money does go to the pension fund. As I recollect, Judge Dwyer ordered the local to restore the monies. And I think it took the form of an accounting, and that at this point in time in this case and at a similar point in the prior case, there was no way with exactitude we could tell exactly how much was due as to each individual. And the individuals were not expected to retain such records as to determine that.

The Court: Why can't an accounting be ordered? Why can't it be done, and the local be ordered to return the monies. If the local wants to seek reimbursement from other sources, that's up to them. I am imposing liability on the local. Period.

Mr. Stern: I wanted to get that clarified—

The Court: That's clarified.

Mr. Stern: —in the order.

The Court: It is the local's responsibility to pay those moneys, not the International's.

Mr. Stern: So there will be a dismissal against the International?

Mr. Nelson: Entirely.

The Court: I will modify my ruling of a moment ago. You have been of assistance to the Court.

Mr. Nelson: Judge, the judgment against the local would be with costs?

The Court: Yes, that is correct.

Thank you very much for coming here today. It has been a pleasure to see you, and I trust you will have a pleasant summer.

Mr. Mulvihill: Thank you. Same to you, Judge.

Mr. Nelson: Thank you, Judge.

(Proceedings terminated.)

* * *

I, B. Peter Slusarek, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcription of my stenographic notes in the preceding matter.

B. Peter Slusarek, C.S.R.,
Official Court Reporter.

Judgment

(Filed—August 4, 1977)

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION—UNION COUNTY

Docket No. C 2154-75

WALTER J. SERAFIN, *et als.*,

Plaintiffs,

vs.

LOCAL UNION NO. 480, *et als.*,

Defendants.

This matter having been tried before the Court in the presence of Craner and Nelson, Esqs., attorneys for the plaintiffs, John A. Craner, Esq. appearing, Nolan, Lynes, Bell and Moore, Esqs., attorneys for defendant, Local Union No. 480, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, John J. Mulvihill, Esq., appearing, and Parsonnet, Parsonnet & Duggan, Esqs., attorneys for the defendant, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Thomas L. Parsonnet and George Duggan, Esqs., appearing, and the Court having heard the testimony and arguments presented by all parties, and due cause appearing for the entry of this judgment,

Judgment

It is on this 4th day of August, 1977 ORDERED and ADJUDGED that judgment be and the same is hereby entered as follows:

1. That the officers and members of the defendant, Local 480, refrain from excluding each of the plaintiffs from membership in the said Local, and further, that they accept into enrolled membership of the said Local each of the plaintiffs so that each may be accorded and exercise all of the rights and benefits under the Constitution of the International Union;

2. That defendant, Local 480, shall account to this Court concerning the collection of all travel service dues of $2.50 per week from each of the plaintiffs for the period beginning from the date when each of the plaintiffs was advised by letter from the defendant, International Assocation that his appeal from the denial of the transfer to defendant, Local 480, was affirmed by the International Association, upon which accountng further Judgment shall be entered in favor of each of the plaintiffs and against the defendant, Local 480, only for such amount as was actually paid by each of the plaintiffs;

3. That costs of suit are awarded to the plaintiffs and against the defendant, Local 480, only;

4. That with respect to any and all other claims for relief by the plaintiff against the defendant, Local 480, the same are denied with prejudice, except as otherwise stated herein;

5. That the Complaint in its entirety against the defendant, International Association, is dismissed with prejudice and without costs;

Judgment

6. That the Motion by defendant Local 480, for a stay of Judgment pending appeal is granted.

EDWARD W. MCGRATH, J.S.C.

We hereby consent to the form
of the within Judgment.

NOLAN, LYNES, BELL & MOORE, ESQS.
By: JOHN J. MULVIHILL

PARSONNET, PARSONNET & DUGGAN, ESQS.
By: GEORGE DUGGAN

Letter Opinion of Kentz, J.S.C., December 5, 1977

CHAMBERS OF
FREDERICK C. KENTZ, JR.
JUDGE

HUDSON COUNTY COURT HOUSE
ADMINISTRATION BUILDING
JERSEY CITY, N. J. 07306

December 5, 1977

Edward T. O'Conner, Esq.
Messrs. Shaljian, Cammarata & O'Conner
850 Bergen Avenue
Jersey City, NJ 07306

Albert Parsonnet, Esq.
Messrs. Parsonnet, Parsonnet & Duggan
10 Commerce Court
Newark, NJ 07102

John A. Craner, Esq.
Messrs. Craner & Nelson
213 Summit Road
Mountainside, NJ 07092

Re: Handley, et al. v. Local 45, et al
Docket No. C 1555-76

Gentlemen:

This matter comes before the court on plaintiffs' motion for summary judgment. Plaintiffs are requesting that defendants be compelled to accept plaintiffs into its membership and that defendants pay damages and counsel fees.

Letter Opinion of Kentz, J.S.C., December 5, 1977

After reviewing the facts in this case, the court finds that there are no disputed material issues of fact and thus this matter is ripe for summary judgment. See *Judson* v. *Peoples Bank & Trust Co. of Westfield,* 17 N.J. 67, 73-75 (1954).

Defendant Local No. 45 is an unincorporated association and a labor union with a membership of approximately 200 journeyman workers, apprentices and trainees employed by various contractors in the steel and ironworking trade throughout the County of Hudson and elsewhere. Local No. 45 is subject to the Constitution of the International Association of Bridge, Structural and Ornamental Ironworkers (the International) which provides in pertinent part as follows:

> Sec. 31. Thereafter a member obtaining a clearance card must present the same to the Local Union into which he desires to transfer for acceptance by it, and the matter shall be referred to the Executive Committee of the Local Union which shall accept or reject such clearance card within the discretion of the Executive Committee. The decision of the Executive Committee of either acceptance or rejection of the clearance card shall be subject to review by the General Executive Board.

Each of the 14 individual plaintiffs is and has been a member in good standing of the International and of a chartered and affiliated local union of the International other than defendant Local No. 45 for many years. The plaintiffs have worked for many years within the territorial jurisdiction alloted to defendant Local No. 45 and have lived in or near this jurisdiction.

Letter Opinion of Kentz, J.S.C., December 5, 1977

Each of the plaintiffs, being desirous of transferring his membership from his present local to Local No. 45 pursuant to section 31 of the International Constitution, applied to Local No. 45 by presenting a transfer card. In the cases of plaintiffs William Handley, Patrick Clarino, John Moniello, Michael Moniello, James Moniello, Richard Sheehan, Carl Clarino, Robert Hartung and Charles Yuocolo (plaintiffs Group A), the Local Union examined the applications for transfer and, based upon an interview conducted by the Executive Board of Local No. 45, denied the applications for transfer. These applications were rejected primarily because counsel for Local No. 45 advised that acceptance of caucasion transfers would "cause an imbalance in the minority makeup of the local and would, therefore, adversely affect the continuing Title VII decree entered in the United States District Court of New Jersey in . . . *U.S. Plumbers* v. *Local 24, et al,* U.S.D.C. N.J. No. 444-71." Plaintiffs' Exhibit A. The defendant contends that the above consent decree requires Local No. 45 to make a good faith attempt to achieve a makeup of 20% of minority journeyman and apprentice members during the period 1972-1977. After being denied transfer by Local No. 45, the above-named plaintiffs appealed to the International General Executive Board which affirmed the Local's rejection of these applications based solely upon "the Civil Rights reason," that is, preventing an imbalance in the alleged quota system required by the United States District Court. Plaintiffs' Exhibit B.

With respect to the transfer applications of plaintiffs Louis DiMascio, Johnny Douglas and William McGuire (plaintiffs Group B), they were rejected for the reason that Local No. 45 is presently "in litigation concerning

such transfers and until such time as the matter is adgudicated [*sic*] your application for transfer is being held in abeyance." Plaintiffs' Exhibit C. Plaintiffs Group B contends that they would have been rejected for the same reason that plaintiffs Group A was rejected and that further appeal would be futile. Defendants have asserted the affirmative defense to the claim of plaintiffs Group B that this court lacks subject matter jurisdiction since these plaintiffs have failed to exhaust the internal union remedy of appeal to the International.

The legal contention of all plaintiffs in this action is that defendants' refusal to accept their applications is arbitrary, unreasonable and hence in violation of the New Jersey Supreme Court's ruling in *Moore* v. *Local No. 483,* 66 N.J. 527 (1975), because the decision in *United States* v. *Plumbers Local No. 24,* No. 444-71 (D.N.J. Dec. 22, 1972), as amended, (Sept. 10, 1973), as amended *sub nom. EEOC* v. *Plumbers Local No. 24,* (Mar. 16, 1977), did not require either a quota system of 80% white members and 20% minority members or exclusion of transfer applications made by white members. Plaintiffs request this court to order their admission to Local No. 45 and to award damages and counsel fees.

The issues before the court are clear. First, this court must decide whether it has subject matter jurisdiction over the claims of plaintiffs Group B. Secondly, in reviewing the final decision of the International, the court must determine whether the reason given for denial of transfer is a reasonable one under the guidelines of *Moore* v. *Local No. 483, supra.*

Defendants have contended that plaintiffs Group B should have exhausted their remedies within the Union

by appealing to the International, and having failed to do so, they are now not entitled to judicial relief. Such an argument was raised and rejected in *Moore* v. *Local No. 483, supra,* at 538 "[T]he doctrine of exhaustion of remedies will not be applied where it is apparent that the relief sought is futile, illusory or vain." *Id.* In this case, an appeal would only mean that the International could have affirmed the abeyance of the decision of transfers. Even if the issue of denial of transfer were addressed, it appears to this court that it would have been uniformly affirmed as had been others. It is obvious that any appeal would have been futile. Thus, the claims of plaintiffs Group B are properly before this court.

As to the claims of all plaintiffs, which are properly before this court, it must be noted that the rejections are being reviewed only upon the grounds which the International stated in its affirmance of the Local's denial—prevention of an imbalance in the quota arrangement decreed by the United States District Court. See *Mundy* v. *Local No. 373,* No. C-2156-75, at 5 (N.J. Super. Ct. Ch. Div., Nov. 9, 1976) (Furman, J.S.C.) (transcript of bench opinion). The alleged conflict between the decisions of the New Jersey Supreme Court in *Moore* and the United States District Court in *Plumbers Local No. 24* has been previously addressed by the courts of this State. See, *e.g., Esposito* v. *Local No. 11,* No. C-2155-75 (N.J.Super. Ct. Ch. Div., Mar. 21, 1977) (Dwyer, J.S.C) (letter opinion); *Mundy* v. *Local No. 373, supra; Connell* v. *Local No. 483,* No. C-4434-74 (N.J.Super. Ct. Ch. Div., Oct. 27, 1976) (Polow, J.S.C.) (transcript of bench opinion). All of the above cited courts determined that the federal court decree in *Plumbers Local No. 24* did not contain a quota system or any other requirement that would bar white

transferees. See *Esposito* v. *Local No. 11, supra,* at 11-12, 22; *Mundy* v. *Local No. 373, supra,* at 6-8; *Connell* v. *Local No. 483, supra,* at 25-26. Furthermore, these courts examined the above reason for denying transfers in light of the *Moore* decision. In *Moore,* the Supreme Court of New Jersey determined that transfer applications to a union must be "fairly and properly considered" and "[a] rejection of an application must have a reasonable basis." 66 N.J. at 537. Rejecting a transfer application for the reason that an imbalance in a non-existent quota system may occur has been found to be "arbitrary" and "without a substantial basis." *Mundy* v. *Local No. 373, supra,* at 9; *accord, Esposito* v. *Local No. 11, supra,* at 21-22; *Connell* v. *Local No. 483, supra,* at 28-29.

This court agrees with the reasoning and the conclusions of the courts in the *Mundy, Esposito* and *Connell* decisions. Nowhere in the consent decree in *Plumbers Local No. 24* is there mention of a quota system. Specific numbers of minorities were to be admitted into the union within the 1972-1977 period; however, as Judge Furman pointed out, expansion or attrition in the total number of members must have been contemplated at the time of signing the consent decree. See *Mundy* v. *Local No. 373, supra,* at 7. Therefore, any percentage which could be calculated by using the minority figure in relation to total membership in 1972 is invalid. It must be concluded that nothing in the *Plumbers Local No. 24* decree prohibits the transfer of white union members.

The court further agrees with the *Mundy, Esposito* and *Connell* courts that the reason for rejecting plaintiffs' applications for transfer were without a reasonable basis as is required by the *Moore* decision. Accordingly, to enforce plaintiffs' rights under the Union Constitution—the

right to transfer when otherwise qualified, the court will order that Local No. 45 admit all of the named plaintiffs into membership. See *Esposito* v. *Local No. 11, supra,* at 23; *Mundy* v. *Local No. 373, supra,* at 10.

As to the compensatory damages, plaintiffs have requested $2.50 for each week worked after denial of transfer for the travel service dues that they were required, under the Union Constitution, to pay when they were not permitted to transfer. A similar damage award was ordered in *Mundy* v. *Local No. 373, supra,* at 13, and in *Esposito* v. *Local No. 11, supra,* at 23. Accordingly, this court directs the defendants to pay to each of the plaintiffs a sum equal to $2.50 for each week worked from the date of the affirmance of the denial of the transfer to Local No. 45 by the International to date.

Following the court's ruling in *Esposito* v. *Local No. 11, supra,* at 23, this court will deny counsel fees as such is not authorized under R. 4:42-9.

Finally, this court will follow the suggestion of plaintiff and dismiss the complaint against the International for the same reasons advanced by the court in *Esposito* v. *Local No. 11, supra,* at 23.

Counsel shall submit an order in accordance with this opinion.

Very truly yours,

FREDERICK C. KENTZ, JR.
J. S. C.

FCK Jr.:d

Judgment

(Filed—January 5, 1978)

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY—CHANCERY DIVISION

Docket No. C-1555-76

Civil Action

HANDLEY, et al.,

Plaintiff,

vs.

LOCAL 45, et al.,

Defendant.

This matter having been brought on before the Court on Motion of plaintiffs for Summary Judgment, Craner & Nelson, Esqs., attorneys for plaintiffs, John A. Craner, Esq., appearing, Parsonnet, Parsonnet & Duggan, Esqs., appearing for defendant, International, Albert S. Parsonnet, Esq., appearing therefore, and Shaljian, Cammarata & O'Conner, Esqs., appearing for defendant, Local Union No. 45, Edward T. O'Connor, appearing, and the Court having read the moving papers, the documents referred to therein, the briefs filed by the respective parties, and having heard the argument of counsel, and good cause appearing for the entry of this Judgment.

Judgment

It is on this 5th day of January 1978, ORDERED and ADJUDGED that judgment be and the same is hereby entered as follows:

1. That the officers and members of defendant, Local 45, refrain from excluding each of the plaintiffs from membership in the said Local, and further, that they accept into enrolled membership of the said Local each of the plaintiffs so that each may be accorded and exercised all of the rights and benefits under the Constitution of the International Union;

2. That defendant, Local 45, shall account to this Court concerning the collection of all travel service dues of $2.50 per week from each of the plaintiffs for the period beginning from the date when each of the plaintiffs was advised by letter from the defendant, International Association, that his appeal from the denial of the transfer to defendant, Local 480, was affirmed by the International Association, upon which accounting further judgment shall be entered in favor of each of the plaintiffs and against the defendant, Local 45, only for such amount as was actually paid by each of the plaintiffs;

3. That costs of suit are awarded to the plaintiffs and against the defendant, Local 45, only;

4. That with respect to any and all other claims for relief by the plaintiffs against the defendant, Local 45, the same are denied with prejudice, except as otherwise stated herein;

5. That the Complaint in its entirety against the defendant, International Association, is dismissed with prejudice and without costs.

FREDERICK C. KENTZ JR. J.S.C.

Consent Decree

Par. 33(B) During the effective period of this Decree, to the extent that the defendant locals accept into membership individuals holding journeyman membership in non-defendant locals of the International, they shall accept or deny the membership applications of such individuals according to the rules and regulations of the defendant locals and the International governing such transfers, provided that such determinations shall be made without having the effect of discriminating against or excluding any such applicant on the basis of his race or color, or of perpetuating the effects of any such past exclusion, and provided further, that all such transferees must meet the minimum qualifications under Paragraph 33 (A) herein. . . .

Par. 38 (c) The JAC shall select and indenture each year no fewer than 75 minority applicants that qualify, if available, in the Ironworker Employer Training Program and in the Apprenticeship Training Program under the selection procedures listed above for a period of no less than five (5) years. The good faith goal shall be to indenture an equal number of applicants in each program, but in any event to indenture no less than 25 minorities in the apprenticeship program.

Excerpt From Hunt Testimony (T. Vol. 8, 31-36)

(31)* A. Yes, we did. We looked at the journeyman membership at the time, and we could see that an addition of 375 minorities would give us something between 20 and 25 percent, and we found that satisfactory.

Q. Now, you say you found that to be satisfactory. Let me ask you this: Was the percentage of minorities in relationship to the total number of the union membership, was that factor important to the government

Mr. Craner: Objection. It's a leading question.
(32) The Court: No. I will allow it.

A. Yes. It was important because of the factor that I have just mentioned, for one thing, that in these lawsuits it's the goal of the plaintiffs, or the government, to get the membership in the union or work force of an employer somewhere in the neighborhood of where it would have been had there been no discrimination. And usually the first you look at to try to figure out what that would have been is minority population figures.

Second reason that this number was important to us was that we knew that if we got approximately 20 percent or more of the union membership being minority that that would be a large enough percentage of the union membership so that the minorities would have a power base from which to protect their rights, to protect, to guarantee that the union wouldn't go back to its previous discriminatory admissions policies; too, perhaps most importantly, to make sure that there wouldn't be discriminatory referrals, for the obvious reason that 20 percent

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* Figurers in parentheses refer to each new page of the stenographic transcript.

figure is a pretty powerful voting block in the union. And, furthermore, that the approximately 375 minorities, if there is an unity at all among them, they can band together and protect their rights. We also thought that it would be a large enough figure so that minorities would bring in their own kind in the next decades.

The Court: What do you mean by that? I don't (33) understand.

The Witness: Very simply, your Honor, unions and employers are, like most things in life, there is a tendency to look out for your friends and your relatives. And we believed that if this union was 20 percent minority they would make sure that they continued to have a fair share, not just for the five years of the consent decree but for the rest of the century, at least.

And our fear was that if it was less than one-fifth of the union membership it would be too small a percentage for them to carry out that idea.

The Court: Mr. Hunt, were you aware at the time you were in this case for the United States of America, were you aware that in addition to the local union members, which you say numbered at that time, I think you said 1400 in the five locals—

The Witness: Approximately.

The Court: All right. Were you aware that there were a lot of non-minority individuals who were journeymen, who were members of the Ironworkers, albeit not members of these particular locals, working out of these locals through the hiring, through the hiring hall referrals?

The Witness: We knew they were out there. We (34) had no idea, your Honor, that it was 1900. We assumed it was far fewer.

The Court: Did the government, if you can tell us, did you on behalf of the government take any position with respect to those individuals, regardless of how many there were, in terms of attempting to achieve the overall result that you have been explaining to us, namely, to try to achieve for minorities within this craft an important foothold which would give them, which would give them a just foothold for the years ahead? Did you, did the government, did you on behalf of the government take a position with respect to these other white ironworkers who were working, who were members of other local unions, not the five locals, but working within that jurisdiction, in terms of this problem that you were dealing with?

The Witness: Yes. Yes, your Honor. But I think it would be helpful if I might explain the overall context in which that was done. If that's all right.

I am sure your Honor has negotiated settlements. And it has always been my belief that if you have a party to any kind of an agreement that wants to get around it, they will find ways, and you are going to (35) constantly, you will be coming back into court with this modification, and stopping them from doing this, stopping them from doing that, and so on, and so on. And in that context of discussions, along those lines, with my colleagues and with my opponents, we talked about a great many ways and fears that we, government attorneys, had.

And I must tell you, your Honor, this was in the early days of these consent decrees. There has been a lot of water under the bridge since those days. And I myself have negotiated settlements with other

construction trade unions in California, and things are done a little bit different now. But this was the early days, and we had these fears.

I recall specifically two fears that we had along the lines that you are expressing, and one was that this union would load up the apprentice program with whites, which would dilute the journeymen membership as those whites became journeymen, and we would lose our foothold.

And, secondly—I must say now, it wasn't as much a concern, but it was there—were these people who we feared would transfer in.

In both cases I and the other government attorneys were confident that it would not happen, (36) because we knew it was not in the interest of these five locals who already had these members of about 1400 journeymen, it would not be in the interest of those 1400 journeymen to do that, because not only would the membership be diluted for the minorities if such a thing had been done, it would also be diluted for the 1400 whites.

Now, we knew that they were going to take whites in, and everybody understood they were entitled to do that, in reasonable numbers. If, however, we had ever foreseen any possibility that suddenly there were gong to be 1900 white members, new white members, it would have been a very different story, for obvious reasons, as I have explained.

So it was there, but it was implicit in the way our negotiations went—I think that's the best way to describe it to your Honor—it was implicit in the way the negotiations went that there wouldn't be that kind of thing; and that if it did happen, we

would be back in Federal court doing something about it, one way or another.

The Court: When you say "We knew they were going to take whites in reasonable numbers" that was your exact phrase, was it not?

Excerpt From Kennedy Testimony (T. Vol. 9, 58-61)

(58)* *Direct Examination by Mr. Mulvihill* (Continued):

Q. Mr. Kennedy, showing you P-22 in evidence, which is the local's letter to Mr. Palus of rejection. In that letter is contained the language "further imbalance in minority makeup of this local and would, therefore, adversely affect the continuing Title VII orders and decrees entered in United States District Court." What did you mean by this statement, "would adversely affect the continuing Title VII orders and decrees"?

Mr. Craner: Objection.
The Court: I will allow it.

A. As I explained yesterday, I reviewed the various percentages for each of the locals, and at that—

(59) The Court: Excuse me for stopping, Mr. Kennedy. Was this your laguage, "adversely affect"?
The Witness: Yes, sir.
The Court: Oh, this was your language. All right. I will allow the question. Go ahead. I am sorry to interrupt you.
The Witness: That's all right.

A. After reviewing the percentages of the locals at that time—

The Court: We can't hear you, Mr. Kennedy. Is the microphone on? Would you speak right into it, Mr. Kennedy.

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* Numerals in parentheses refer to each new page of the stenographic transcript.

Excerpt from Kennedy Testimony

A. After reviewing the percentages of the minority makeup of the locals, I determined that they really should have been at least at 12 percent at that time, which was 1975. None of the locals at that time had achieved 12 percent—most of them were under 10 percent. The affect of accepting transfers at that time, I determined that that would create a further imbalance, since they were supposed to be, really, if they were progressing according to the five-year plan they should have been at least at 12 percent, and they were not. And further inputs of white transfers would create a further imbalance.

Q. Now, when you say they should have been at (60) 12 percent, how did you arrive at that figure? A. Well, if you start from the year 1972, when the decree went into effect, and they should have had 4 percent, at least, by '72-'73, 8 percent by '73-'74, 12 percent by '74-'75. For the following year they would have had to have gone to 16, and at the conclusion, which was the '75-'76, they should have arrived at a minimum of 20 percent.

Q. Now, on Page 2 of that same letter the language is used, "acceptance of white transfers at this time would place Local 480 in jeopardy of violating its commitments and obligations to the government." A. Yes, sir.

Q. What commitments and obligations were you referring to? A. Well—

The Court: Is this your language?
The Witness: Yes, sir.
The Court: All right.

A. In my experience with the government in this case, there was a commitment and an agreement, if you will, to reach a minimum goal of 20 percent by 1977.

Additionally, in 1975, I was not altogether sure, really, what was the language in the consent decree concerning

Excerpt from Kennedy Testimony

the makeup of the apprenticeship classes. In (61) other words, that's the 1400 figure. The 375 was not clearly spelled out as a goal or quota, or whatever, you know, that the government mght wish to take. And I was concerned that, although I knew there was a verbal commitment, I was not altogether sure that the documents when construed by a court could not have been made out to be a quota, and that the not achievement of that and the radical change, that is accepting transfers when you were imbalanced, might be a violation of the decrees.

Mr. Mulvihill: I have nothing further, Judge.
The Court: You may cross-examine the witness. Oh, Mr. Parsonnet, I am sorry.
Mr. Parsonnet: No questions.
The Court: Thank you. Mr. Craner, you may cross-examne.
Mr. Craner: Thank you, your Honor.

Cross-examination by Mr. Craner:

Q. Mr. Kennedy, you indicated at the very outset of your testimony that you had become involved in representing the District Council in January of 1973, is that correct?
A. That's correct.
Q. And do you know who was representing the locals, and, in particular, Local 483 at that time?

EEOC Determination Letter, March 31, 1977
Re: Gilbert Jones

Equal Employment Opportunity Commission
Newark District Office
744 Broad Street Room 502
Newark, New Jersey 07102

Charge No. 022762144

Mr. Gilbert Jones
8614 Durham Avenue
North Bergen, New Jersey 07047
Charging Party

International Association of
Bridge, Structural & Ornamental
Iron Workers Local 483
Paterson, NJ 07502
Respondent

Determination

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral, and all other jurisdictional requirements have been met. The New Jersey Department of Law and Public Safety, Division on Civil Rights, waived jurisdiction over the charge on October 18, 1976.

Charging Party alleges that Respondent Local Union discriminated against him in violation of Title VII of Civil

EEOC Determination Letter, March 31, 1977
Re: Gilbert Jones

Rights Act of 1964, as amended, by denying transfer into Respondent Local membership solely because of his race (Caucasian).

Respondent denies any discrimination and contends that acceptance of Charging Party's transfer into the Local Union will cause further imbalance in its minority make-up and would place Respondent in jeopardy of violating its commitments and obligations to the Judicial Branch of the Federal Government.

It is undisputed that Respondent Local Union and the Commission entered into a Consent Decree that imposes upon Respondent the obligation to increase its membership by 20% minority Journeman and Apprentices. It is also undisputed that Charging Party is not a member of the minority groups specified in the Consent Decree.

Evidence in the record does not support Charging Party's allegation. Records show that Respondent's Local Union entered in a Consent Decree, presently in effect, that imposes an obligation to achieve 20% minority membership from 1972 to 1977. Records demonstrate that by accepting Charging Party and other Caucasians on its membership would place Respondent's Local Union in jeopardy of violating its commitments and obligations under the Decree.

The Commission and the Court have established that the only way discrimination against some can be eliminated is to eliminate also that which is in favor of the others. By doing this, one who was formerly in a favored position may well suffer some loss. This loss, however, is only of that privilege or benefits to which the losers were not justifiably entitled.

EEOC Determination Letter, March 31, 1977
Re: Gilbert Jones

Accordingly, there is not reasonable cause to believe that Charging Party's denial of transfer allegation has merit. This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court within 90 days of the receipt of this letter and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

On behalf of the Commission:

PHILIP G. LEE, District Director

Date: 3-31-77
JM/ag

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

PHILIP MUNDY, et al.,

Plaintiffs-Respondents and Cross-Appellants,

v.

LOCAL UNION No. 373, et al.,

Defendants-Appellants and Cross-Respondents.

[DOCKET No. A-1846-76]

GEORGE CONNELL, et al.,

Plaintiffs-Respondents and Cross-Appellants,

v.

LOCAL UNION No. 483, et al.,

Defendants-Appellants and Cross-Respondents.

[DOCKET No. A-3260-76]

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

EITEL HESPELT, et al.,

Plaintiffs-Respondents and Cross-Appellants,

v.

LOCAL UNION No. 483, et al.,

Defendants-Appellants and Cross-Respondents.

[DOCKET No. A-3261-76]

ALFONSO ESPOSITO, et al.,

Plaintiffs-Respondents and Cross-Appellants,

v.

LOCAL UNION No. 11, et al.,

Defendants-Appellants and Cross-Respondents.

[DOCKET No. A-3866-76]

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

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WALTER SERAFIN, et al.,

Plaintiffs-Respondents and Cross-Appellants,

v.

LOCAL UNION No. 480, et al.,

Defendants-Appellants and Cross-Respondents.

[DOCKET No. A-4920-76]

WILLIAM HANDLEY, et al.,

Plaintiffs-Respondents,

v.

LOCAL UNION No. 45, et al.,

Defendants-Appellants.

[DOCKET No. A-2086-77]

Argued May 24, 1978—Decided

Before Judges Matthews, Crane and Antell.

On appeal from Superior Court, Chancery Division, Sussex, Hudson, Essex, Middlesex and Union Counties.

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

Mr. Joseph M. Nolan argued the cause for Defendants-Appellants and Cross-Respondents Local Unions in Docket Nos. A-1846-76, A-3260-76, A-3866-76 and A-4920-76 (Messrs. Nolan, Lynes, Bell & Moore, attorneys; Mr. John J. Mulvihill of counsel).

Mr. Edward T. O'Connor, Jr. argued the cause for Defendant-Appellant Local Union 45 in Docket No. A-2086-77 (Messrs. Shaljian, Cammarata & O'Connor, attorneys).

Mr. Harold Stern of the New York Bar, admitted *pro hac vice*, argued the cause for Defendant-Appellant International Association in Docket Nos. A-3260-76 and A-3261-76 (Messrs. Parsonnet, Parsonnet & Duggan, attorneys; Mr. Albert S. Parsonnet of counsel).

Mr. John A. Craner argued the cause for Plaintiffs-Respondents and Cross-Appellants in Docket Nos. A-1846-76, A-3260-76, A-3261-76, A-4920-76 and A-2086-77 (Messrs. Craner and Nelson, attorneys).

Mr. John J. Bracken argued the cause for Plaintiffs-Respondents and Cross-Appellants in Docket No. A-3866-76 (Messrs. Bracken & Craig, attorneys).

PER CURIAM

These six cases were consolidated for appeal. All involve the same questions of law and basic fact, although each involves different parties. Inexplicably, the cases were tried by five different Chancery Division judges (A-3260-76 and A-3261-76 were tried together), all reaching the same result.

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

The background for all of the cases and the essential basic facts may be found in the opinion of the Supreme Court in *Moore* v. *Local Union No. 483*, 66 N.J. 527 (1975).

Essentially, each case involved the efforts of individual members of various Locals of defendant International Union to be transferred from an out-of-state Local of which the plaintiff was a member to an in-state Local. The in-state Locals constitute the various defendants in the six cases. In each case the application of each plaintiff for transfer was denied substantially for the reason that a judgment of the United States District Court for the District of New Jersey prohibited such transfer. That judgment, entered in the case of *United States of America* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 24* (Civil No. 444-71, entered July 28, 1972), ordered defendant International here, among others, to cease and desist from discriminating against minorities when admitting new members to the various Locals. It was the opinion of defendants that to permit transfer of plaintiffs would destroy the balance of minority to white members which it was claimed was ordered by the aforementioned District Court judgment.

In each case, plaintiffs instituted actions in the Chancery Division seeking an order directing the transfer as requested.

In *Mundy* (A-1864-76), Judge Furman ordered defendant Local to accept all 27 plaintiffs as members. He conditioned the acceptance of one plaintiff on proof that he resided within the territorial jurisdiction of the Local.

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

He dismissed the complaint as to the International and denied the imposition of punitive damages against it. He directed the Local to refund all travel service dues paid by plaintiffs from the dates of their rejections until their actual transfers. He denied punitive damages as to the defendant Local and awarded plaintiffs' counsel a fee of $500. Defendant Local appeals from the whole of the judgment, and plaintiffs cross-appeal from the dismissal of the International, the denial of compensatory and punitive damages other than the travel service dues, and the amount of the counsel fees.

In *Connell* and *Hespelt* (A-3260-76 and A-3261-76) (these cases represent the actual trial of *Moore* v. *Local 483* on remand), Judge Polow ordered the defendant Local to accept the transfer of 20 of the 29 plaintiffs. He awarded each of 27 plaintiffs $500 as compensatory and punitive damages against the Locals and $500 punitive damages against the International. He denied the application for counsel fees. Both the Local and the International appeal the whole of the judgment, and plaintiffs cross-appeal from the refusal to admit 9 of the plaintiffs and the denial of counsel fees.

In *Esposito* (A-3866-76), Judge Dwyer directed Local 11 to enroll the 13 plaintiffs as members subject, in the case of plaintiff Durante, to proof of medical qualification. He ordered reimbursement of the travel service dues and dismissed the complaint as to the International, denying punitive damages. He also denied counsel fees. The Local appeals the entire judgment and 10 plaintiffs cross-appeal from the dismissal of the International, the denial of damages other than the travel service dues reimbursement, and the denial of counsel fees. Three of the plaintiffs appeal only as to the denial of damages and counsel fees.

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In *Serafin* (A-4920-76), Judge Ackerman directed the defendant Local to enroll all eight plaintiffs as members and to reimburse the travel service dues paid from the dates the plaintiffs received letters from the International upholding their rejections. He dismissed the complaint as to the International and awarded costs to plaintiffs which were to be borne solely by defendant Local. All other relief sought was denied. Defendant Local appeals from the whole of the judgment and plaintiffs appeal from the dismissal of the International, the denial of compensatory and punitive damages and the denial of counsel fees.

Finally, in *Handley* (A-2086-77), Judge Kentz granted summary judgment in favor of plaintiffs in a letter opinion in which he relied principally on the opinions of the judges in the *Mundy, Esposito* and *Connell* cases. He directed the defendant Local to enroll the 14 plaintiffs as members and to reimburse the travel service dues from the dates plaintiffs received letters from the International upholding their rejections. He also awarded costs which were to be borne solely by defendant Local. He dismissed the complaint as to the International. All other relief was denied. The Local appeals from the entire judgment but there is no cross-appeal.

We agree with all of the judges below that the Title VII decree entered in the United States District Court (mentioned above) was not a sufficient reason to reject the transfers sought by the plaintiffs herein. We agree with them that there is no basis in the judgment to construe a requirement of 20% as was contended for by each of the Locals. We also agree that the International did not act in bad faith in upholding the determinations of the various Locals since its role in transfer matters is circumscribed

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

by the International Constitution. There is no evidence in any of the cases of bad faith on the part of the International. We agree with all of the judges except Judge Polow in the denial of punitive damages, both against the Local Unions and the International. The absence of bad faith dictates this result. Consequently, we reverse so much of the judgment entered in *Connell* and *Hespelt* above which awards plaintiffs punitive damages against the Local and the International.

We find no basis for the award of counsel fees to plaintiffs' counsel in any of the cases. *Red Devil Tools* v. *Tip Top Brush Co., Inc.*, 50 N.J. 563 (1967), does not, in our view, support an award of counsel fees such as those sought for here. In each instance the denial of transfer was based upon the advice of counsel because of the construction and import of the Title VII decree entered in the United States District Court. While these plaintiffs (and, indeed, others) have long been delayed in their efforts to achieve transfer to an in-state Local, and while many of those delays were interposed for reasons described by counsel as "tribal," nevertheless we find that the civil rights proceedings against the unions gave some basis for refusing transfer. While we ultimately disagree with that construction of the decree, we do not believe that defendants should be penalized therefor. In view of this, we vacate so much of the judgment in *Mundy* (A-1846-76) which awards counsel fees to plaintiff.

Except as modified herein, we affirm the several judgments of the Chancery Division for the reasons expressed by each of the judges in his opinion.

No costs.

Order of New Jersey Supreme Court Denying Petition for Certification

(Filed—September 5, 1978)

SUPREME COURT OF NEW JERSEY

C-95 SEPTEMBER TERM 1978

PHILIP MUNDY, et al.,

Plaintiffs-Respondents,

v.

LOCAL UNION No. 373, et al.,

Defendants-Petitioners.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 5th day of September, 1978.

(ILLEGIBLE)
Clerk

Order Dismissing Petition and Vacating Restraints

(Filed—October 4, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 444-71

UNITED STATES OF AMERICA,

Plaintiffs,

—vs.—

PLUMBERS LOCAL 24, et al.,
(IRONWORKERS CLUSTER)

Defendants.

This matter being opened to the Court upon Verified Petition of Ironworkers, Local Unions Numbers 11, 373, 480, and 483, and this Court having issued a Temporary Restraining Order on September 21, 1978 restraining certain counsel and party-plaintiffs in civil actions pending in the Superior Court of New Jersey, as more particularly identified therein, from seeking enforcement, implementation, or further prosecution of the judgments recovered therein, and scheduling a heading on Petitioner-Defendants' application for preliminary injunction on September 29, 1978;

And Nolan, Lynes, Bell and Moore, A Professional Corporation, Attorneys for Petitioner-Defendants, Jardine

and Morrice Esqs., Attorneys for Joint Apprenticeship Committee, Leonard Mazor, Esq., Attorney for Equal Employment Opportunity Commission Craner and Nelson, A Professional Corporation, and Antranig Aslanian, Esq., Attorneys for the Plaintiffs in the said state actions appearing;

And the Court having considered the moving papers and the briefs filed in support of and in opposition to the relief sought in the Verified Petition, and having heard the oral argument of the respective attorneys for the parties on September 29, 1978, and the parties having stipulated that the determination of this Court herein is to be deemed a Final Judgment;

It is on this 29th day of September, 1978 Ordered and Adjudged, for the reasons more fully set forth in the Oral Opinion of this Court read into the record on this date, the same being incorporated herein by reference as if more fully set forth, as follows:

1. That the temporary Restraining Order entered herein on September 21, 1978 be, and the same is, hereby dissolved;

2. That the Verified Petition and application for preliminary injunction of Petitioner-Defendants be, and the same are, hereby dismissed and denied, respectively; and

3. That the effective date and time of this Order be, and the same is, hereby stayed until October 6, 1978 at 5:00 p.m., at which time this Stay shall expire automatically.

H. Curtis Meanor, J.U.S.D.C.N.J.

Oral Opinion

(39) I will state my reasons orally for the record in this case. I hope they are adequate.

There are two reasons I am not going to reserve and write any written opinion. First, I don't have the time, and second, I think it is important that this matter be resolved expeditiously.

Five different judges of the Superior Court of New Jersey, Chancery Division in six different cases have ordered the defendant locals to admit some 80 white transferees to membership in those locals.

The Appellate Division of the Superior Court has affirmed those six judges and, as I understand it, the New Jersey Supreme Court has denied certification for review of the Appellate Division judgment.

There is no reported opinion in this State Court litigation.

The defendant locals have for many years been under a consent decree in this case to admit 375 black members into their apprenticeship program into the Union originally over a period of five years, and by consent order signed by me, that program has been prolonged.

The impact of the admittance of these 80 transferees upon the Federal Court consent decree was an argument made against their admittance before the five State Court judges who passed on this matter and uniformly those (40) judges found that the admittance of transferees would in no way frustrate or impair the State Court order.

The Appellate Division agreed with that determination.

When the judicial process was completed in the New Jersey courts, the motion was made here for injunction restraining the execution or operation under the State Court decrees by admitting these members because such admittance would impair or frustrate the Federal Court order.

It is argued that the intent of the consent order was to establish a quota of 20 percent minorities in these defendant locals. It is conceded there is nothing expressed in the order that establishes such a percentage quota.

It is true that if you take into consideration the existing or then existing number of men in the local and lay that alongside the figure of 375 minorities to be admitted over the first five year plan, you get to an approximate number of 20 percent minorities. But I am not going to read into this consent order any such quota unless it is expressly set forth therein and it is not.

The consent order was amended September 10, 1973 with respect to paragraph 33B. I will read it in pertinent part:

"During the effective period of the decree, to the extent that the defendant locals accept into membership (41) individuals holding journeymen membership in nondefendant locals of the international, they shall accept or deny the membership applications of such individuals according to "—I will paraphrase—applicable rules and regulations, and it goes on to conclude: "provided that such determinations shall be made without having the effect of discriminating against or excluding any such applicant on the basis of his race or color, or of perpetuating the effects of any such past exclusion."

I think as a matter of plain English I have to read this consent decree, particularly the last clause, as affecting past racial discrimination against the transferees and not against others.

The State Courts have determined these 80 transferees have a legal right to be admitted into these locals. I have no power and no authority to set aside or question that judgment. I have to accept the State Court judgment as accomplished, accurate, legal fact, and I do.

I cannot see where the event of adding transferees will in any way impair or affect or frustrate the Federal Court order.

First, it is clear that the apprenticeship program under the consent decree as amended will go forth and will take in a certain number of minorities each year until the number of 375 have been admitted. And the entry of the transferees will in no way, in my judgment, frustrate or (42) affect that program.

Second, the transferees at the present time legally, regardless of what it is contended the Union does in fact, have the same equal right to be assigned to jobs as the presently existing local members.

Their presence as members or nonmembers will in no way affect job assignments if the locals are following the law in the way job assignments are to be made.

As I understand it, anyone who is qualified, be he a local member, a nonlocal member or even nonunion altogether, may put his name on the list for job assignment and job assignment takes place in the order in which the name appears on the list.

This would apply for black or white, this would apply to member or nonmember, a transferee or otherwise. And since these transferees all have the right to put their names on the list and be selected in order, I cannot see how their presence as members instead of just qualified people who put their names on the list, in any way frustrates any minority's ability to obtain employment.

One argument that has been made is that the political power of minority admittees to these unions will be diminished if we add more whites.

Well, I'm not prepared to say that that is so. It makes an assumption I think, as I pointed out in argument (43) to Mr. Lynes, that is dangerous to make. It makes an assumption that in this Union the whites will vote as a voting block and that the blacks will vote as a voting block. If there's anything that Title 7 was designed to prevent and designed to cure it's exactly the kind of attitude on the part of people that would lead to such block voting.

I'm not willing to tag the white members of this Union with preordained commitments to vote as a block contrary to the interests of minority members.

Mr. Lynes recognizes, I think, in argument, the dangerousness of that assumption and he points out the appearance of the nondiscriminatory status on the part of these unions. He says, and I think correctly, that historically the minorities in this country have felt that the construction trade unions were racist, and that a great deal has been accomplished in the past decade to expel that impression. And I think that's probably true.

He also says that failure to restrain the enforcement of the State Court orders will give rise to an ugly specter once again.

First, that is too ephemeral a reason for me to interfere with the operation of a State Court order.

Second, what is really sought here in my judgment is to use the fact of past racial discrimination on the part of these defendants as a reason for the perpetuation (44) of their historical discrimination against transferees. And I think there's a certain irony in that argument, particularly if it comes from the E.E.O.C. Second, if experience shows that minority rights are somehow being frustrated or impaired by the presence of these transferees in these locals, then the thing to do is not to discriminate against the transferees but to adjust the consent order so that that discrimination against blacks can be eliminated.

All right, Mr. Lynes, do you intend to appeal? The E.E.O.C. intend to appeal?

Order Denying Stay Pending Appeal

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2296

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PLUMBERS LOCAL 24, *et al.*,
(Ironworkers Cluster)

Defendants.

(D. C. Civil Action No. 444-71)

The appellants having applied to me as a single judge for an injunction pending appeal, and it appearing to me that the subject matter of the appeal has been litigated in New Jersey State Courts to a judgment final in all respects except for a petition for certiorari, and that there are no equitable considerations suggesting why the appellants should not be relegated to the remedy of certiorari, it is

ORDERED that the application for a stay pending appeal be and is hereby denied without prejudice to its renewal before a panel of this court.

By the Court,

JOHN J. GIBBONS
Circuit Judge

Dated: